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Supreme Court, U.S.
FILED
AUG 4 - 2009
OFFICE OF THE CLERK
William K. Suter, Clerk

No. 09-231

In The

Supreme Court of the United States

CHARLES BROWN, *et al.*,

Petitioners,

v.

DAVID HOVATTER, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Virtually alone among the states, Maryland forbids corporate ownership of funeral homes and allows only Maryland-licensed funeral directors to own funeral homes. Together, this functional residency requirement and corporate-ownership ban substantially burden the ability of national funeral chains and nonresident entrepreneurs to participate in the Maryland funeral market. The questions presented are:

1. Are commerce-burdening laws immune from challenge under the dormant Commerce Clause so long as they only restrict the interstate flow of capital rather than physical goods?

2. The balancing test established by *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), requires courts to determine whether the burden on interstate commerce caused by a challenged regulation is clearly excessive in relation to its "putative local benefits." Must those benefits be real or will purely speculative benefits suffice?

PARTIES TO THE PROCEEDING

The Petitioners are Charles Brown, Joseph B. Jenkins, III, Brian Chisholm, and Gail Manuel.

The Respondents are the members of the Maryland State Board of Morticians, David Hovatter, Faye Patterson, Michael Ruck, Sr., Gladys Sewell, Donald V. Borgwardt, Marshall Jones, Jr., Michael Kruger, Brian Haight, Robert Bradshaw, Jeffrey Pope, and Vernon Strayhorn, in their official capacities.

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OPINION BELOW

The United States Court of Appeals for the Fourth Circuit denied the petition for rehearing en banc without opinion. The panel decision of the court of appeals is reported at 561 F.3d 357 and is reprinted in the Appendix (App.) at 1-29. The decision of the District Court is reported at 516 F. Supp.2d 547 and is reprinted at App. 30-72.

JURISDICTION

The Court of Appeals denied the petition for rehearing en banc on April 24, 2009. On July 8, 2009, Chief Justice Roberts granted Petitioners' motion to extend the deadline for this Petition to August 21, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Commerce Clause of the United States Constitution. U.S. Const. art. I, § 8, cl. 3. App. 87. The challenged statute is the Maryland Morticians Act, Md. Health Occ. Code § 7-101 *et seq.*, the relevant portions of which are reproduced at App. 88-103.

STATEMENT

A. Factual Background

The facts of this case are simple, clear, and, with respect to the burdens on interstate commerce, undisputed. Petitioner Brian Chisholm is a Maryland-licensed funeral director who now lives in Celebration, Florida. He wants to invest financial and human capital into the Maryland funeral market and bring the profits back to his home in Florida. Like countless entrepreneurs across the country, Chisholm wants to engage in interstate commerce – putting his capital and talents to their most productive use where they will be most rewarded.

To accomplish this, Chisholm needs to do the one simple thing that makes complex interstate enterprises possible: form a corporation. As the evidence established, owning an interstate business as a corporation is a practical necessity in the funeral home context for the same reason it is a necessity in every other context. Corporations have advantageous attributes that direct personal ownership of a business cannot provide – perpetual existence, superior ability to raise capital, limited liability, ease of transferability, and others. The nation has a robust and integrated funeral home market because the ability to structure successful funeral home businesses as corporations allows them to grow and to serve customers across the country.

Maryland, however, has largely isolated itself from this interstate market by forbidding entrepreneurs like

Chisholm from owning funeral homes in Maryland as corporations. Md. Morticians Act, Health Occ. Code § 7-309(a) (hereafter "Morticians Act § 7-___"). App. 100-101. For all practical purposes, this nearly unique ban on corporate ownership[1] sets aside the Maryland funeral home market exclusively for Marylanders by requiring a prospective funeral home owner to do two things that will almost invariably require Maryland residency: (1) become a Maryland-licensed mortician (which requires not only two years of mortuary school but also a lengthy *in-state* apprenticeship[2]); and (2) own the desired Maryland funeral home in his or her personal capacity. *Id.* at § 7-310. App. 102-103 (providing that only a "licensed individual" – i.e., a Maryland-licensed mortician – may obtain the funeral establishment license needed to operate a funeral home).

Maryland does allow a small amount of interstate investment to seep into its domestic funeral home market through a provision in the Morticians Act that "grandfathered" 58 funeral homes that were

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[1] Only New Hampshire similarly prohibits corporations from owning funeral homes. N.H. Rev. Stat. Ann. § 325:15.

[2] *See* Morticians Act § 7-303 (qualifications for licensure). New morticians must serve an apprenticeship of at least one year and experienced morticians relocating from other states must serve a 1,000-hour apprenticeship. Morticians Act §§ 7-303(b)(2), 7-305(b)(3). App. 94-96. These apprenticeships must be served at a Maryland funeral home because the statute defines an "apprentice sponsor" as a Maryland-licensed mortician. *Id.* § 7-101(c)(1). App. 88.

operating as corporations before 1945. Morticians Act §§ 7-309, 7-310(c)(2). App. 100-103. These corporate licenses are freely transferable, and they have become highly valuable because they represent the special privilege of operating a business as a corporation in an environment where most people cannot. App. 41-42.

These "grandfathered" corporate licenses represent the only way that nonresidents, including the major national funeral chains, may participate in the otherwise closed Maryland funeral home market. National chains have acquired 30 of the 58 grandfathered corporate funeral homes, meaning that only 30 of Maryland's roughly 270 funeral homes are owned by out-of-state enterprises, while the rest remain in the hands of local owners. Professor David Harrington, the nation's leading funeral industry economist, confirmed the startling degree to which Maryland has sealed itself off from the national funeral home market by offering unrebutted testimony that the rate of investment in Maryland by national funeral chains is drastically lower than it is in other states.

And that is precisely the point. The Respondents themselves acknowledged in the proceedings below that Maryland's restrictions on corporate ownership "have prevented the [domestic] funeral industry from becoming as saturated by national chains as the rest of the national funeral market." They also quoted approvingly a letter from the chief lobbyist for the Maryland State Funeral Directors Association, Jim Doyle, in which he observed that "[t]he potential

expansion of national conglomerates . . . has also undoubtedly played a substantial role" in the legislature's refusal to eliminate the corporate ownership ban. Mr. Doyle also testified that:

- The ownership ban "places a check on the ability of . . . publicly traded corporations . . . to thrive or spread in Maryland"; and
- Legislators resisted efforts to amend the law because they "were concerned about what would happen if the conglomerates were given a green light to simply be able to move into Maryland."

Respondent Gladys Sewell, a fourth-generation Maryland-licensed mortician, testified that the corporate prohibition is valuable precisely because it protects her from having to compete with the national funeral chains. As a result of these and other admissions, the district court correctly concluded that "the Maryland funeral home industry has benefitted from the most blatantly anticompetitive state funeral home regulation in the nation." App. 68.

B. Proceedings Below

Petitioners filed suit in 2006 under 42 U.S.C. § 1983 alleging that Maryland's restrictions on funeral home ownership by corporations violate the dormant Commerce Clause. Specifically, Petitioners argued that the Maryland Morticians Act: (1) discriminates against interstate commerce in practical

effect; and (2) fails the balancing test set forth in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), because the burdens on interstate commerce are enormous and the local benefits literally nonexistent.

On cross-motions for summary judgment, the District Court ruled that Maryland's corporate ownership ban violates the dormant Commerce Clause because it "severely limits the ability of out-of-state businesses from opening a funeral home in Maryland." App. 69. Characterizing the state's claims of consumer protection as "no more than entirely speculative," App. 65-66 (internal quotations and citation omitted), the Court held that the corporate ownership ban's burdens on interstate commerce were "intolerable and clearly excessive in relation to any benefits proffered by the [Respondents]." App. 69.

The Fourth Circuit reversed. Judges Niemeyer and Traxler ruled as a matter of law that this case does not even implicate the dormant Commerce Clause. In their view, Maryland's restrictions on funeral home ownership by corporations constitute only "local regulation of a localized profession where services are performed for clients entirely in Maryland." App. 21. The fact that the challenged restrictions indisputably limit the ability of non-resident entrepreneurs like Petitioner Chisholm to invest capital and expertise into the Maryland funeral market – and obtain profits in return – was irrelevant, they said, because the Morticians Act "is not aimed at any interstate flow of goods, materials, or other articles of commerce," which, according to

Judges Niemeyer and Traxler, is all the dormant Commerce Clause protects. *Id.* ("Because the Morticians Act does not place a barrier or burden on the flow of interstate commerce, it does not violate the dormant Commerce Clause.")

Then, in the only portion of the opinion that Judge Shedd joined, the panel performed a perfunctory *Pike* analysis, holding that even if the dormant Commerce Clause did apply, the Petitioners could not prevail because the burdens on interstate commerce from prohibiting corporate funeral home ownership are not clearly excessive when weighed against the entirely speculative benefits of: (1) greater accountability to government regulators; and (2) encouraging familiarity with the day-to-day workings of the funeral business. App. 23-24.

The Petitioners sought rehearing en banc on the grounds that the panel's holding that the interstate movement of investment capital, expertise, and profits are not protected by the dormant Commerce Clause directly conflicts with rulings of this Court and because the panel's acceptance of illusory local benefits for which there was no supporting evidence directly conflicted with Fourth Circuit precedent and with this Court's application of *Pike* balancing. The petition for rehearing was denied.

REASONS FOR GRANTING THE PETITION

I. REVIEW IS REQUIRED BECAUSE THE FOURTH CIRCUIT DRASTICALLY NARROWED THE SCOPE OF THE DORMANT COMMERCE CLAUSE, CAUSING A SPLIT OF AUTHORITY AND CREATING A BLUEPRINT FOR ECONOMIC PROTECTIONISM.

The record in this case is clear: the Maryland funeral industry has been caught red-handed advancing the parochial interests of its members at the expense of the national market in funeral services. The undisputed record evidence – and indeed the admissions of the Respondents themselves in the proceedings below – make clear that Maryland maintains its virtually unique restrictions on corporate ownership of funeral homes in order to limit the ability of nonresidents to invest in and derive profits from the local funeral industry. As uncontroverted expert testimony from the nation's leading funeral economist made clear, that effort has been quite successful, rendering Maryland a virtual island in the national stream of funeral commerce.

But instead of squarely confronting that fact, the Fourth Circuit narrowed the dormant Commerce Clause in two distinct ways. First, the court of appeals held that the dormant Commerce Clause does not even apply to the challenged restrictions because limiting the ability of nonresidents to own funeral homes in Maryland does not affect the "*flow of interstate commerce* – the flow of goods, materials, and other articles of commerce across state lines."

App. 15 (emphasis in original). According to the Fourth Circuit's holding below, the dormant Commerce Clause is triggered only when a statute is "aimed at the interstate flow of goods, materials, or articles of commerce," such as the motorcycles at issue in the most recent – and relevant – Fourth Circuit precedent. App. 21 (citing *Yamaha Motor Corp., U.S.A. v. Jim's Motorcycle, Inc.*, 401 F.3d 560 (4th Cir. 2005)). Second, the Fourth Circuit also narrowed the dormant Commerce Clause by holding that it does not apply when the challenged restrictions involve the structure or method of doing business, such as operating a funeral home as a corporation. App. 17-18 (holding that "the matter of which the [Petitioners] complain – the manner of professional practice in Maryland – are not matters protected by the dormant Commerce Clause").

This sort of formalism has no place in dormant Commerce Clause analysis, particularly given this Court's oft-repeated admonition that "[t]he principal focus of inquiry must be the *practical operation* of the statute." *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 37 (1980) (emphasis added). By restricting the dormant Commerce Clause to physical articles of commerce, App. 17, and insulating from review demonstrably protectionist state laws involving corporate ownership of ordinary businesses, App. 17-18, the Fourth Circuit severely curtailed the scope of the dormant Commerce Clause. In doing so, the court created a split of authority with grave implications for the national common market.

A. The Fourth Circuit's Holding That Investment Capital, Profits, And Professional Expertise Are Not Articles Of Commerce Directly Conflicts With Decisions Of This Court And Other Circuits.

The Fourth Circuit's primary holding in the decision below was that the "Maryland Morticians Act does not place a barrier or burden on the flow of interstate commerce" because the statute "is not aimed at any interstate flow of goods, materials, or articles of commerce." App. 21. In an opinion for the panel joined only by Judge Traxler, Judge Niemeyer ruled in effect that intangible articles of commerce such as investment capital and business expertise are not articles of commerce at all. Quoting this Court's decision in *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 803 (1976), Judge Niemeyer suggested that the dormant Commerce Clause is so narrow that it applies only to the interstate movement of "raw materials and finished goods." App. 15-16 (internal quotations omitted).

Judge Niemeyer's opinion is in direct conflict with *Lewis*, *supra*, which invalidated a Florida banking statute that prohibited out-of-state banks from establishing bank-holding companies in Florida to offer investment advice to Floridians. 447 U.S. at 38-39. Although *Lewis* did not expressly hold that interstate investment capital and professional expertise are articles of commerce, that was a necessary premise of its holding.

The Fourth Circuit's elevation of form over substance – by holding that the movement of investment capital and profits across state lines is not interstate commerce – is fundamentally inconsistent with *Lewis*. It is also inconsistent with the holdings of cases in other circuits that the dormant Commerce Clause protects not merely the interstate movement of physical goods, but also the ability of nonresidents to invest in local markets.[3] Because the Fourth Circuit's unduly narrow view of the dormant Commerce Clause

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[3] *See Island Silver & Spice, Inc. v. Islamorada*, 542 F.3d 844, 846-47 (11th Cir. 2008) (holding that a village zoning provision that effectively precluded any new interstate chain retailer from establishing a store in the village had the practical effect of discriminating against interstate commerce and violated the dormant Commerce Clause); *Jones v. Gale*, 470 F.3d 1261, 1264-65 (8th Cir. 2006) (striking down on dormant Commerce Clause grounds a law that prohibited corporate ownership of farms in Nebraska); *Walgreen Co. v. Rullan*, 405 F.3d 50, 57-58 & n.5 (1st Cir. 2005) (holding that a Puerto Rico law that limited the ability of nonresidents to own local pharmacies burdens interstate commerce sufficiently to trigger dormant Commerce Clause scrutiny despite the fact the law did not regulate the flow of actual physical goods into Puerto Rico); *Alliant Energy Corp. v. Bie*, 330 F.3d 904, 914 (7th Cir. 2003) (holding that the opportunity for nonresidents to invest in local utility companies constitutes an "article of interstate commerce" under the dormant Commerce Clause); *Cooper v. McBeath*, 11 F.3d 547, 555 (5th Cir. 1994) (striking down on dormant Commerce Clause grounds provisions of the Texas Alcoholic Beverage Code that prohibited nonresidents from obtaining permits to operate in-state alcoholic beverage enterprises and from obtaining majority ownership of corporations possessing such permits).

is explicitly grounded in a subsidiary line of this Court's jurisprudence starting with *Hughes*, review is necessary to prevent the Fourth Circuit decision from becoming a blueprint for economic protectionism – one ostensibly approved by this Court.[4]

B. There Is A Split Of Authority On Whether The Dormant Commerce Clause Reaches State Regulation Of The Form Of Doing Business Such As The Use Of Corporations.

Granting review to clarify what constitutes an "article of commerce" would also provide the Court with the opportunity to clarify its holding in *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978), which has been a source of great confusion in the case

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[4] The Fourth Circuit opinion also conflicts with decisions of this Court holding that the negative and affirmative Commerce Clauses are equal in scope. *See Camps Newfound/Owatonna v. Town of Harrison*, 520 U.S. 564, 572-74 (1997) (compiling cases). By concluding that the dormant commerce power does not apply because "the Maryland Morticians Act is a local regulation of a localized profession where services are performed for clients entirely in Maryland," 561 F.3d at 366-67, the Fourth Circuit implicitly concluded that Congress lacks the authority under its affirmative commerce power to regulate the local funeral home industry. While that is consistent with the original, and what many would regard as proper, understanding of the affirmative commerce power, it is inconsistent with this Court's jurisprudence and inconsistent with federal regulations such as the Federal Trade Commission's "Funeral Rule," 16 C.F.R. § 453.1, *et seq.*, which minutely regulates how funeral establishments interact with their customers.

law, as the decision below illustrates. Citing *Exxon*, the Fourth Circuit held that "the matters of which [Petitioners] complain – the manner of professional practice in Maryland – are not matters protected by the dormant Commerce Clause." App. 17-18. The Fourth Circuit's opinion, in other words, categorically places state restrictions on the use of corporations beyond the scope of the dormant Commerce Clause, a rule that would have disastrous consequences for national markets if widely accepted.

But *Exxon* plainly does not stand for the proposition that state regulation of the form of doing business, such as restrictions on the use of corporations in certain industries, can *never* violate the dormant Commerce Clause. Its holding is far more prosaic. In *Exxon*, Maryland forbade vertical integration in the petroleum industry, which required oil refiners with retail gas stations to shut down their gas stations in Maryland. 437 U.S. at 121. The oil refiners proved that the challenged statute would force them out of the local retail gas market, but did not prove that less gasoline would flow into Maryland as a result. *Id.* at 123, 127-28. In other words, the refiners established only an individual impact, rather than an injury to the interstate market. This Court, therefore, held that they had not established a violation of the dormant Commerce Clause because the Clause protects interstate markets, not market participants.

Exxon's unremarkable holding – that the dormant Commerce Clause requires proof of an actual

burden on interstate commerce – is being dangerously transformed. Thus, in *CTS Corp. v. Dynamics Corp. of America*, this Court invoked *Exxon* in holding that state regulation of tender offers for state corporations was essentially immune from dormant Commerce Clause review because the Clause does not reach state regulation of the form or structure of doing business. 481 U.S. 69, 90-94 (1987). *CTS*, in other words, treated *Exxon* as though it stands for something much larger than it does; namely, that state regulation of the form or structure of doing business is necessarily outside the scope of the dormant Commerce Clause in all cases.

The Court's later view of *Exxon*, as expressed in *CTS*, has been a source of significant confusion among the lower courts. For example, the Fourth Circuit seems to have understood *Exxon* as standing for the proposition that no matter how substantial the burden on interstate commerce, and no matter how invidious a state's motives might be, so long as the state is regulating only the form of business, it is effectively immune from dormant Commerce Clause challenge. The Third and Fifth Circuits have also indicated that *Exxon* stands for the proposition that state restrictions on the form of doing business are beyond the reach of the dormant Commerce Clause.[5]

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[5] *Ford Motor Co. v. Tex. Dep't of Transp.*, 264 F.3d 493, 503 (5th Cir. 2001) (car manufacturers forbidden from owning car dealerships) (quoting *Exxon*, 437 U.S. at 127); *Ford Motor Co. v.*

(Continued on following page)

Other courts, for the time being at least, hew to a generally proper reading of the case.[6]

C. The Split Of Authority On The Scope Of The Dormant Commerce Clause Has Grave Implications For The National Economy.

The purpose of the Commerce Clause is to ensure a common national market. As the Court's decisions have long recognized, the thirteen former colonies were untenable as a nation under the Articles of Confederation because, with the dissipation of the British threat, the unity of the revolutionary era gave way to ever-multiplying trade barriers. *See, e.g.*, *H.P. Hood & Sons v. Du Mond*, 336 U.S. 525, 533 (1949) (examining historical basis of Commerce Clause). The Constitution, and the Commerce Clause in particular, were the Founders' solution to the atomizing effect of state economic protectionism. *Id.* Accordingly, the Commerce Clause has always been understood to have a negative aspect that protects the access of all citizens to the domestic markets of every state.

Muir, 874 F.2d 926, 944-45 (3d Cir. 1989) (insurance companies may not affiliate with savings and loans).

[6] *E.g.*, *Tenn. Scrap Recyclers Ass'n v. Bredesen*, 556 F.3d 442, 450-451 (6th Cir. 2009); *Kleinsmith v. Shurtleff*, 571 F.3d 1033, 23-24 (10th Cir. 2009); *Kleenwell Biohazard Waste v. Nelson*, 48 F.3d 391, 397 (9th Cir. 1995); *Gov't Suppliers Consol. Servs., Inc. v. Bayh*, 975 F.2d 1267, 1279 (7th Cir. 1992).

By narrowing the scope of the dormant Commerce Clause on the basis of tensions within this Court's jurisprudence, the Fourth Circuit's opinion presents a serious danger to the national common market. Thus, states in the Fourth Circuit, along with industry groups like the Maryland State Funeral Directors Association, can now favor local economic interests at the expense of nonresidents with impunity so long as barriers to interstate commerce only affect intangibles such as investment capital or the form of doing business.

Such economic protectionism will be nearly impossible to stop because legislatures and industry groups will adorn their activities with the necessary fig leaf of legitimacy. If the Fourth Circuit's holding stands, states will be able to disguise their economic protectionism as long as local interests are willing to tolerate a few inconveniences, like the inability to operate certain businesses as corporations, to enjoy the benefits of a restricted market. By restricting corporate ownership, states could shield local businesses from virtually every national-level enterprise. For instance, if local businesses suddenly decided they did not wish to compete with McDonald's, or Starbucks, or Best Buy, they need only persuade the legislature to enact for them the exact same corporate ownership ban that Maryland has for funeral homes. But allowing that would produce precisely the sort of "Balkanization" the Commerce Clause was intended to prevent.

II. THE DECISION BELOW EXACERBATED AN ACUTE AND GROWING SPLIT AMONG THE CIRCUITS CONCERNING THE "LOCAL BENEFITS" ELEMENT OF THE *PIKE* TEST.

A state law that burdens interstate commerce without overt discrimination is evaluated under the test set forth in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). That test asks whether the burden imposed on interstate commerce is "clearly excessive in relation to the putative local benefits." *Id.* at 142. The circuits are sharply divided on a simple but fundamental question: must the local benefits be real, or will purely speculative benefits suffice?

The Court has never resolved that question, and the result has been a growing split, with four circuits on one side, four on the other, and three that appear to vacillate. The lower courts need guidance, and this Court will eventually have to provide it. Further delay will only lead to more inconsistent results.

A. How Much Deference A State's Assertion Of Local Benefits Should Receive Under *Pike* Remains Unclear.

The *Pike* test contains an inherent tension concerning the issue of local benefits. That tension has never been resolved, and, as documented below, it has caused a pronounced split among the circuits. This case presents an opportunity to reduce the tension – and bring greater consistency to circuit law

– by indicating whether courts should automatically defer to a state's assertion of a local benefit or require at least some proof that it exists.

Pike requires courts to determine whether "the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." 397 U.S. at 142. But there is an inherent tension between the terms "clearly excessive" and "putative." "Excessive" indicates comparison, and, particularly when coupled with "clearly," implies some actual, quantitative analysis. By contrast, the word "putative" means "supposed, believed, reputed." Bryan A. Garner, A DICTIONARY OF MODERN LEGAL USAGE 721 (2d ed. 1995). It is a term of supposition, of conjecture. Thus, *Pike* itself sends mixed signals concerning the parties' respective burdens in challenging and defending commerce-burdening laws.

Two conflicting lines of authority have emerged. One line requires proof that the asserted local benefits be both genuine and "credibly advanced" by the commerce-burdening regulation. The other requires no evidence and will instead accept any "rational" assertion of benefit by the state. Naturally, those approaches yield different results, which means that a regulation with no demonstrable local benefits – like the one at issue here – will be upheld in some circuits, struck down in others, and a toss-up in the rest.

The divergent lines of authority may be traced to this Court's fractured decision in *Kassel v.*

Consolidated Freightways Corp., 450 U.S. 662 (1981). For purposes of this petition, *Kassel* is more important for the basic point on which the Justices agreed than on their various disagreements, involving how much deference the courts should give to a state's justifications for commerce-burdening regulations. The point on which all three opinions appear to have agreed was that the local benefits asserted in support of a commerce-burdening law should be real and not merely speculative. Simply reaffirming that principle – from which a number of circuits have strayed with no explicit warrant from this Court – would substantially clarify the *Pike* test and harmonize, at least to a degree, the decisional law in the circuits.

Kassel involved a dormant Commerce Clause challenge to an Iowa law that restricted the use of 65-foot double tractor trailers within the state. *Id.* at 665. Recognizing the special deference normally accorded to matters of traditionally local concern like highway safety, Justice Powell, in a plurality opinion joined by Justices Stevens, Blackmun, and White, nevertheless concluded that the truck-length restrictions "unconstitutionally burden interstate commerce." *Id.* at 671. In reaching that conclusion, the plurality considered the competing evidence offered by the parties and concluded that the asserted safety interest was "illusory," *id.*, and that the state had imposed a substantial burden on interstate commerce "without any significant countervailing safety interest." *Id.* at 678.

Justice Brennan wrote a concurring opinion joined by Justice Marshall in which he argued that it was clear Iowa had adopted the truck-length restriction for the improper purpose of promoting the interests of Iowa residents at the expense of neighboring states. *Id.* at 687 (Brennan, J., concurring in judgment). Justice Brennan emphasized his view that the relevant inquiry is the legislature's *actual* purpose in passing the law, *id.* at 680-81, and when that purpose is apparent – as he believed it was in *Kassel* – then courts should not consider *post hoc* justifications. *Id.* at 682.

Justice Rehnquist, joined by the Chief Justice and Justice Stewart, dissented. Unlike the concurring Justices, he did not believe the restriction was motivated by an improper purpose, *id.* at 705, and, unlike the plurality, he concluded that "there was sufficient evidence presented at trial to support the legislative determination that [truck] length is related to safety. . . ." *Id.* at 696.

The point on which all three opinions appear to agree is that the "local benefits" asserted by the state in justifying its commerce-burdening restrictions must be real and must find at least some support in the evidentiary record. *Compare id.* at 671-74 (plurality opinion) (assessing evidentiary record); *with id.* at 686 (concurring opinion) (court will not second-guess legislature so long as safety justifications are not "illusory") *and id.* at 693-96 (dissenting opinion) (reviewing trial record and finding "sufficient evidence" to support safety justification). Indeed, even

writing in dissent, Justice Rehnquist emphasized three separate times that the relevant question is whether the local benefits from a challenged regulation are so "slight or problematical" as to undercut the state's asserted justifications. *Id.* at 692, 696, 698. The only way to make that determination, of course, is to consider the actual evidence, if any, of local benefits, as both the plurality and dissenting opinions did in *Kassel*.

This Court has not deviated from *Kassel*'s teaching that local benefits must be supported with evidence that is neither "illusory," *id.* at 671, 686, nor "pretext[ual]," *id.* at 692, nor "slight or problematical." *Id.* Nevertheless, a line of cases has developed in the circuits in which courts will accept purely speculative local benefits unsupported by any evidence – something this Court has never approved and that cannot be reconciled with *Kassel* or with any of the Court's subsequent *Pike* cases.

B. There Is Disarray Among And Within The Circuits As To Whether Local Benefits Must Be Proven Or Merely Asserted.

The circuits are profoundly divided over a simple question in applying the *Pike* test: whether states must demonstrate the existence of actual local benefits, or whether they may rely instead on raw assertions, as Maryland did in this case. The disarray is further accentuated by the existence of several intracircuit splits, including one in the Fourth Circuit

caused by the decision below. The question is one of profound importance because it is difficult to imagine any regulation for which some merely "putative" local benefit cannot at least be hypothesized. And if that is all that is required to immunize a commerce-burdening regulation – as it now appears to be in at least four circuits – then the *Pike* test will cease to be a test in any meaningful sense of the word. If that is the Court's intention, then perhaps it would be best to say so explicitly. If that is not the Court's intention, then lower courts should know that as well.

The fundamental point of disagreement among – and in some cases within – the circuits is whether evidence matters when it comes to the "putative local benefits" prong of the *Pike* test. The circuits may be grouped as follows:

I.	No evidence required:	1st, 5th, 9th, and D.C.
II.	Evidence required:	2d, 3d, 8th, and 10th
III.	Intracircuit splits:	4th, 6th, and 7th

Those groupings are explained below and are represented graphically in the following chart on the next page.

ACTUAL EVIDENCE REQUIRED

2ND

- *Ass'n of Int'l Auto. Mfrs., Inc. v. Abrams*, 84 F.3d 602 (1996)
- *Southaid v. E. Hampton*, 477 F.3d 38 (2007)

3RD

- *Cloverland-Green Spring Dairies, Inc. v. Pa. Milk Mktg. Bd.* 298 F.3d 201 (2002)
- *Lebanon Farms Disposal, Inc. v. County of Lebanon*, 538 F.3d 241 (2008)

8TH

- *Burlington N. R.R. Co. v. Neb.* 802 F.2d 954 (1986)
- *U & I Sanitation v. City of Columbus*, 205 F.3d 1063 (2000)
- *R & M Oil & Supply, Inc. v. Saunders*, 307 F.3d 731 (2002)

10TH

- *ACLU v. Johnson*, 194 F.3d 1149 (1999)
- *Blue Circle Cement, Inc. v. Bd. of County Comm'rs of County of Rogers*, 27 F.3d 1496 (1994)

NO EVIDENCE / "RATIONAL JUSTIFICATION"

- *Tolchin v. Supreme Court of the State of N.J.*, 111 F.3d 1099 (1997)
- *A.S. Goldmen & Co. v. N.J. Bureau of Sec.*, 163 F.3d 780 (1997)

4TH

- *Medigen of Ky., Inc. v. Pub. Serv. Comm'n of W.Va.*, 985 F.2d 164 (1993)
- *Psinet, Inc. v. Chapman*, 362 F.3d 227 (2004)
- *Yamaha Motor Corp., U.S.A. v. Jim's Motorcycle, Inc.*, 401 F.3d 560 (2005)
- *Brown v. Hovatter* 561 F.3d 357 (2009)

6TH

- *ANR Pipeline Co. v. Schriedewind*, 801 F.2d 228 (1986)
- *Interstate Towing Ass'n Inc. v. City of Cincinnati*, 6 F.3d 1154 (1993)
- *Reynolds v. Buchholzer* 87 F.3d 827 (1997)
- *McNeilus Truck & Mfg., Inc. v. Ohio ex rel Montgomery* 226 F.3d 429 (2000)

7TH

- *Amanda Acquisition Corp. v. Universal Food Corp.*, 877 F.2d 496 (1989)
- *Gov't Suppliers Consolidating Serv., Inc. v. Bayh*, 975 F.2d 1267 (1992)
- *K-S Pharm., Inc. v. Am. Home Prod. Corp.*, 962 F.2d 728 (1992)
- *Nat'l Paint & Coatings Ass'n v. City of Chicago*, 45 F.3d 1124 (1995)
- *Nat'l Solid Wastes Mgmt. Ass'n v. Meyer*, 63 F.3d 652 (2005)
- *Cave Int'l, Inc. v. Madigan*, 500 F.3d 551 (2007)
- *Wesmueller v. Kostbade*, 571 F.3d 699 (2009)

1ST

- *Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294 (2005)

5TH

- *Serv. Mach. & Shipbuilding Corp. v. Edwards*, 617 F.2d 70 (1980)
- *Ford Motor Co. v. Tex. Dep't of Transp.*, 264 F.3d 493 (2001)
- *Int'l Truck & Engine Corp. v. Bray*, 372 F.3d 717 (2004)
- *Allstate Ins. Co. v. Abbott*, 495 F.3d 151 (2007)

9TH

- *Spokle v. Mont.*, 411 F.3d 1051 (2005)

D.C.

- *Electrolert Corp. v. Barry*, 737 F.2d 110 (1984)

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1. No evidence required: 1st, 5th, 9th, and D.C.

The spirit of the no-evidence approach is aptly summarized in the First Circuit's observation that "under *Pike*, it is the *putative* local benefits that matter. It matters not whether these benefits actually come into being at the end of the day." *Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 313 (1st Cir. 2005). Similarly, while it once required evidence that the challenged restriction actually produce the asserted local benefits,[7] the Fifth Circuit has since adopted a more deferential standard akin to rational basis review. *See Allstate Ins. Co. v. Abbott*, 495 F.3d 151, 164 (5th Cir. 2007) (explaining that "we credit a putative local benefit 'so long as an examination of the evidence before or available to the lawmaker indicates that the regulation is not wholly irrational in light of its purposes'") (quoting *Kassel*, 450 U.S. 662, 680-81 (Brennan, J., concurring)).[8]

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[7] *See Serv. Mach. & Shipbuilding Corp. v. Edwards*, 617 F.2d 70, 75-76 (5th Cir. 1980) (explaining that under *Pike* "a court must examine the benefits that supposedly result from the local law, and not rely merely on the assertion of an accepted local interest" that is "illusory").

[8] *See also Int'l Truck and Engine Corp. v. Bray*, 372 F.3d 717, 728 (5th Cir. 2004) (same); *Ford Motor Co. v. Tex. Dep't of Transp.*, 264 F.3d 493, 503-04 (5th Cir. 2001) (citing *Kassel* concurrence for proposition that it is not for courts to decide whether challenged regulation "in fact" promotes the stated purpose and concluding that there was "evidence from which a reasonable legislator could believe" that the benefits would result).

The Ninth Circuit has also adopted what amounts to a rational basis standard in applying the *Pike* test, invoking *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981) for the proposition "states 'are not required to convince the courts of the correctness of their judgments.'" *Spoklie v. Montana*, 411 F.3d 1051, 1059 (9th Cir. 2005).[9] Finally, while the D.C. Circuit has had little occasion to consider the issue, it too has adopted the no-evidence approach. Indeed, in the one *Pike* case that research revealed, it appears that the plaintiffs challenging Washington, D.C.'s ban on the possession of radar detectors were not even permitted to introduce evidence to support their claim that the ban would be ineffective in reducing speeding. *Electrolert Corp. v. Barry*, 737 F.2d 110, 112 (D.C. Cir. 1984). The court upheld the law on the grounds that the government's safety rationale was not "'illusory'" or "'nonexistent,'" apparently in the absence of any evidence that the ban actually promoted that interest as a matter of fact. *Id.* at 113.

2. Evidence required: 2d, 3d, 8th, and 10th.

The Second Circuit explicitly requires actual evidence of local benefits in *Pike* cases. In fact, in a

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[9] *Clover Leaf Creamery* involved both equal protection and dormant Commerce Clause claims. The quoted passage comes from the portion of the opinion dealing with equal protection under the rational basis standard. 449 U.S. at 464.

recent decision remanding a case to the district court, the panel specifically noted conflicting expert testimony in the proceedings below and pointed out that "[i]n applying the Pike balancing test, the District Court did not refer to the conflicts in these expert affidavits or engage in any meaningful examination of the claimed local benefits conferred by the [challenged] Ferry Law." *Southold v. E. Hampton*, 477 F.3d 38, 52 (2d Cir. 2007). The panel observed that on the basis of the summary judgment record before the district court, "a reasonable fact finder could conclude that the Ferry Law *does not actually produce any of its intended benefits* so as to justify the potential burden on interstate commerce." *Id.* (emphasis added).[10]

The Eighth Circuit also requires evidence of actual local benefits. For example, *R & M Oil & Supply, Inc. v. Saunders*, 307 F.3d 731 (8th Cir. 2002), involved a Missouri law requiring propane suppliers to maintain a minimum storage capacity of 18,000 gallons. *Id.* at 733. The state characterized the regulation as a public health and safety measure designed to protect people who rely on propane to heat their homes from shortages. *Id.* at 735. But the

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[10] *See also Ass'n of Int'l Auto. Mfrs., Inc. v. Abrams*, 84 F.3d 602, 612-13 (2nd Cir. 1996) (reversing grant of summary judgment upholding New York law requiring certain disclosures about automobile bumpers and noting that "the validity of the legislative assumption . . . is debatable" and that conflicting evidence "reveal[s] substantial questions as to whether in fact significant benefits are created" by the statute).

Eighth Circuit rejected that argument on the grounds that "the local benefit *actually derived* from the statute is minimal or nonexistent." *Id.* at 735 (emphasis added). That conclusion was based in part on the fact that the state "presented no evidence" that existing propane storage capacities were insufficient. *Id.*[11]

The Tenth Circuit requires evidence of actual local benefits too. Thus, in upholding the preliminary injunction of a New Mexico law regulating speech on the Internet in *ACLU v. Johnson*, 194 F.3d 1149, 1161-62 (10th Cir. 1999), the court acknowledged New Mexico's compelling interest in protecting minors from sexually explicit materials, but found that the "local benefits" of the restriction were "not huge," that enforcement of the law "is beset with practical difficulties," and that the "actual benefit" of the law would be extremely small.[12]

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[11] *See also U & I Sanitation v. City of Columbus*, 205 F.3d 1063, 1070-71 (8th Cir. 2000) (striking down local waste ordinance where the alleged benefits of the statute were "sheer speculation"); *Burlington N. R.R. Co. v. Nebraska*, 802 F.2d 994, 1004 (8th Cir. 1986) (observing that it would not be difficult to imagine a nondiscriminatory, commerce-burdening regulation "that advances some legitimate safety objective only slightly, yet imposes massive burdens on interstate commerce").

[12] *See also Blue Circle Cement, Inc. v. Bd. of County Comm'rs of County of Rogers*, 27 F.3d 1499, 1512 (10th Cir. 1994) (remanding case involving challenge to hazardous waste ordinance and noting the absence of evidence in the record concerning whether the ordinance addressed any "significant health or safety hazard," as well as no evidence whether the

(Continued on following page)

While the Third Circuit was initially more deferential,[13] its more recent rulings place it within the pro-evidence camp as well. Thus, in *Lebanon Farms Disposal, Inc. v. County of Lebanon*, 538 F.3d 241 (3d Cir. 2008), the Third Circuit mirrored the approach of the Second Circuit in *Southold*, *supra*, remanding when the factual record was insufficient. As the panel explained, "the record is incomplete regarding the burden on interstate commerce and, *more importantly, the putative local benefits*." *Id.* at 252 (emphasis added).[14]

Finally, the Eleventh Circuit does not appear to have had a *Pike* case in which the outcome turned on the existence or nonexistence of local benefits. But the court did strike down a county landfill restriction based on its conclusion that the county could have achieved its public welfare objectives "'as well with a lesser impact on interstate activities.'" *Diamond*

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restriction was "reasonably related" to any such hazards, and no evidence whether the county's interest could be advanced as well with a lesser impact on commerce).

[13] *A.S. Goldmen & Co. v. N.J. Bureau of Sec.*, 163 F.3d 780, 788-89 (3d Cir. 1999) (upholding New Jersey securities law on the basis of admittedly speculative future harms); *Tolchin v. Supreme Court of N.J.*, 111 F.3d 1099, 1109-10 (3d Cir. 1997) (asserted benefits "rationally related" to challenged restriction).

[14] *See also Cloverland-Green Spring Dairies, Inc. v. Pa. Milk Mktg. Bd.*, 298 F.3d 201, 216 (3d Cir. 2002) (explaining that the government defendants could not "simply rely on the Milk Law's stated purpose. They must provide evidence that the wholesale price floors have the benefits contemplated by the General Assembly.").

Waste, Inc. v. Monroe County, 939 F.2d 941, 945 (11th Cir. 1991) (quoting *Pike*, 397 U.S. at 142). That approach seems more in keeping with the ethic of circuits that require some evidence of actual local benefits.

3. Intracircuit splits: 4th, 6th, and 7th.

The Fourth, Sixth, and Seventh Circuits all have conflicting decisions from which it is difficult to extract a consistent principle or trend.

While the Seventh Circuit's tone in applying *Pike* is consistently deferential,[15] the decisions themselves are more nuanced. For example, Judge Posner recently wrote an opinion reinstating a dormant Commerce Clause challenge to a Wisconsin law that allows graduates of Wisconsin law schools – but not

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[15] *See, e.g.*, *Cavel Int'l, Inc. v. Madigan*, 500 F.3d 551, 555 (7th Cir. 2007) (expressing doubt whether *Pike* balancing is available to plaintiffs without showing of at least "mild" discrimination against interstate commerce); *Nat'l Paint & Coatings Ass'n v. City of Chicago*, 45 F.3d 1124, 1130 (7th Cir. 1995) (citing *Amanda Acquisition*, *infra*, for proposition that "the dormant commerce clause does not replace the rational-basis inquiry with a broader, all-weather, be-reasonable vision of the Constitution") (internal quotations and citations omitted); *K-S Pharm., Inc. v. Am. Home Prods. Corp.*, 962 F.2d 728, 731 (7th Cir. 1992) (arguing that "dormant commerce clause does not call for proof of a law's benefits" when the subject of the challenged law is trade); *Amanda Acquisition Corp. v. Universal Foods Corp.*, 877 F.2d 496, 505 (7th Cir. 1989) (arguing that *Pike* test may actually be concerned only with discrimination and not "baleful effects").

schools in other states – to be admitted to practice law in Wisconsin without passing the state bar. *Wiesmueller v. Kosubucki*, 571 F.3d 699, 701 (7th Cir. 2009). Finding no overt discrimination, the panel sought to apply *Pike* balancing but found that it could not because of the "evidentiary vacuum" created by the early dismissal of the case. *Id.* at 704. The panel reasoned that Wisconsin's diploma privilege would only make sense if Wisconsin law were in fact a greater part of the curriculum of the two accredited Wisconsin law schools (Marquette and Madison) than it is of various out-of-state law schools like Harvard or Yale. *Id.* Recognizing that the law's actual effects on commerce might well be small, the panel noted that not much would be required to justify it, but explained that "[o]ur concern is that there may be nothing at all to justify it." *Id.* at 705.

Thus, in *Wiesmueller* at least, evidence regarding the actual existence or non-existence of local benefits mattered. Otherwise, the panel could simply have *assumed* that Wisconsin law schools are more likely than others to teach Wisconsin law (or, more to the point, the panel could have assumed that the *legislature* had made such an assumption). That certainly seems to be what the First, Fifth, Ninth, and D.C. Circuits would have done, and yet the Seventh did not: it remanded the case to the district court because "the plaintiffs were denied an opportunity to try to prove their case" – presumably with evidence that the challenged law did not in fact

produce the putative local benefits asserted by the state. *Id.* at 707.[16]

The Sixth Circuit's application of *Pike* is similarly unsettled,[17] and the Fourth Circuit, though previously consistent in requiring at least some evidence of local benefits,[18] now has an intracircuit split as a result of

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[16] *See also Nat'l Solid Wastes Mgmt. Ass'n v. Meyer*, 63 F.3d 652, 663 (7th Cir. 1995) (finding Wisconsin recycling statute impermissibly discriminatory but also noting that the law could not pass muster under *Pike* because the state had not "demonstrated" the need to pursue its environmental policies in the manner that it did); *Gov't Suppliers Consol. Servs., Inc. v. Bayh*, 975 F.2d 1267, 1286 (7th Cir. 1992) (rejecting discriminatory Indiana waste disposal statutes and noting that they also flunked the *Pike* test because the statutes "will further their stated purposes only marginally").

[17] *Compare McNeilus Truck and Mfg., Inc. v. Ohio ex rel. Montgomery*, 226 F.3d 429, 444 (6th Cir. 2000) (striking down "protectionist" Ohio vehicle manufacturer licensing law and finding that it also failed *Pike* balancing due to "lack of any significant local benefit") *and ANR Pipeline Co. v. Schneidewind*, 801 F.2d 228, 237 (6th Cir. 1986) (striking down Michigan utility law because "[a]n analysis of the alleged benefits reveals that they do not further important state interests") *with Reynolds v. Buchholzer*, 87 F.3d 827, 831 & n.4 (6th Cir. 1997) (refusing to consider plaintiffs' arguments that original purpose of fishing restrictions was "no longer viable" and observing that "[t]his question is better submitted to the legislature") *and Interstate Towing Ass'n, Inc. v. City of Cincinnati*, 6 F.3d 1154 (6th Cir. 1993) (upholding Cincinnati towing ordinance on the basis of an assumption that asserted benefits would arise, but without actual evidence).

[18] *See Psinet, Inc. v. Chapman*, 362 F.3d 227, 240 (4th Cir. 2004) (rejecting Virginia law prohibiting dissemination of material harmful to minors over the Internet where asserted local benefits, though compelling, "have not been proven"); *Medigen of*

(Continued on following page)

the decision below upholding a law, apparently for the first time in the Fourth Circuit, for which the asserted local benefits were "no more than 'entirely speculative.'" App. 65-66 (district court quoting *Medigen*, 985 F.2d at 167).

C. Confirming That States Must Provide Some Evidence Of Actual Local Benefits Would Restore A Significant Measure Of Consistency To The Lower Courts' Application Of *Pike*.

This Court has never squarely addressed whether the "putative local benefits" element of the *Pike* test requires actual evidence or may instead be satisfied with "rational" speculation. Although the Court reached an implicit consensus on that point in *Kassel*, the absence of more specific guidance has engendered a profound split among and within the circuits.

Such differing standards threaten the unity of the nation's common market, which it is the purpose of the dormant Commerce Clause to protect. The Court will eventually need to resolve that split, and this case is a good place to start.

Ky., Inc. v. Pub Serv. Comm'n of W. Va., 985 F.2d 164, 167 (4th Cir. 1993) (striking down medical waste hauling restriction where asserted local benefits were "entirely speculative").

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 21, 2009

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

CHARLES BROWN; JOSEPH B. JENKINS, III; BRIAN CHISHOLM; GAIL MANUEL, Plaintiffs-Appellants, v. DAVID HOVATTER; FAYE PETERSON; MICHAEL RUCK, SR.; GLADYS SEWELL; DONALD V. BORGWARDT; MARSHALL JONES, JR.; MICHAEL KRUGER; BRIAN HAIGHT; ROBERT BRADSHAW; JEFFREY POPE; VERNON STRAYHORN, SR., in their official capacities as members of the Maryland State Board of Morticians, Defendants-Appellees.	No. 08-1121
CHARLES BROWN; JOSEPH B. JENKINS, III; BRIAN CHISHOLM; GAIL MANUEL, Plaintiffs-Appellees, v. DAVID HOVATTER; FAYE PETERSON; MICHAEL RUCK, SR.; GLADYS SEWELL; MARSHALL JONES, JR.; MICHAEL KRUGER; DONALD V. BORGWARDT; ROBERT BRADSHAW; JEFFREY POPE; BRIAN HAIGHT; VERNON STRAYHORN, SR., in their official capacities as	No. 08-1125

members of the Maryland State Board of Morticians,

Defendants-Appellants.

Appeals from the United States District Court for the District of Maryland, at Baltimore.

Richard D. Bennett, District Judge

(1:06-cv-00524-RDB)

(Filed Mar. 27, 2009)

Argued: January 27, 2009

Decided: March 27, 2009

Before NIEMEYER, TRAXLER, and SHEDD Circuit Judges.

Affirmed in part and reversed in part by published opinion. Judge Niemeyer wrote the opinion, in which Judge Traxler joined. Judge Shedd wrote a separate concurring opinion.

COUNSEL

ARGUED: Clark Neily, INSTITUTE FOR JUSTICE, Arlington, Virginia, for Appellants/Cross-Appellees. Steven Marshall Sullivan, OFFICE OF THE ATTORNEY GENERAL OF MARYLAND, Baltimore, Maryland, for Appellees/Cross-Appellants. **ON BRIEF:** William H. Mellor, Jeffrey T. Rowes, INSTITUTE FOR JUSTICE, Arlington, Virginia, for Appellants/Cross-Appellees. Douglas F. Gansler, Attorney General of Maryland, Kathleen A. Ellis, Assistant Attorney General, Grant D. Gerber,

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OPINION

NIEMEYER, Circuit Judge:

Charles Brown, Joseph Jenkins, Brian Chisholm, and Gail Manuel, who refer to themselves as "funeral and cemetery entrepreneurs," commenced this action to strike down as unconstitutional the Maryland Morticians and Funeral Directors Act (the "Morticians Act"), Md. Health Occ. Code § 7-101 *et seq.* They contend that the Act, insofar as it prohibits *corporate* ownership of mortician's licenses and funeral establishments (except for 58 corporations grandfathered into the Act in 1945) and *unlicensed individual* ownership of funeral establishments (except for surviving spouses and executors of licensed morticians), violates the Equal Protection Clause, the Due Process Clause, and the dormant Commerce Clause of the U.S. Constitution. They argue: "Effectively shielded from most out-of-state competition, Maryland funeral industry members profit handsomely from the most blatantly anti-competitive funeral regulation in the nation, [effectively] add[ing] nearly $800 to the cost of a funeral in Maryland." (Internal quotation marks and record references omitted). They claim that they are unable to participate equitably in Maryland's funeral industry because of Maryland's

anticompetitive restrictions on funeral establishment ownership.

The district court, ruling on motions for summary judgment, concluded that the Morticians Act did not violate either the Equal Protection Clause or the Due Process Clause, but that it did violate the dormant Commerce Clause. In support of its dormant Commerce Clause ruling, the court said that the Act's "corporate [ownership] prohibition severely limits the ability of out-of-state businesses from opening a funeral home in Maryland." The parties filed cross-appeals.

For the reasons that follow, we affirm the district court's conclusions with respect to the Equal Protection Clause and the Due Process Clause for substantially the same reasons given by the district court. And because Maryland's licensing requirements do not unjustifiably burden interstate commerce, we reverse the district court's dormant Commerce Clause ruling. At bottom, we conclude that the Morticians Act is constitutional as to each of the plaintiffs' challenges.

I

The Morticians Act requires individuals who wish to "practice mortuary science in [Maryland]," to be licensed by the Maryland State Board of Morticians. Md. Health Occ. Code § 7-301(a). To qualify for a license, an individual must be of good

moral character; must have completed an apprenticeship; must have a specified educational background; and must have passed national and Maryland examinations. *Id.* § 7-303(b).

The Act also requires any individual who owns a "funeral establishment" to license the establishment, *i.e.*, "building, structure, or premises from which the business of practicing mortuary science is conducted." *Id.* §§ 7-310, 7-101(h). Unlicensed individuals may not own a funeral establishment, except for spouses and executors of deceased licensed individuals. *Id.* §§ 7-310(c)(2), 7-308, 7-308.1.

Corporations, except those grandfathered in as of 1945, may not be licensed as morticians or funeral directors, *id.* § 7-309, and may not own a funeral establishment, *see id.* § 7-310. Under the grandfather clause, enacted in 1945, a corporation, that held a license on June 1, 1945, that has been continually renewed, may own and operate a funeral establishment and continue to do so as long as the corporation exists, provided that "any practice of mortuary science that is conducted for the corporation is practiced by a licensed individual." *Id.* § 7-309(b), (d). The parties agree that there are 58 corporations grandfathered under § 7-309(b), that are licensed to engage in the business or profession of "funeral directing or embalming," allowing them to own and operate funeral establishments, and the stock of these corporations is freely transferable by its owners. Currently, the stock of 3 of the 58 corporations remains in the hands of the original owners,

and the stock of 30 of those corporations is held by out-of-state public corporations and national chains. The plaintiffs claim that it can cost up to $250,000 to purchase the stock of a corporation grandfathered to hold a license.

The four plaintiffs wish to own and operate funeral establishments through the corporate form without being individually licensed. Brown is a Maryland resident who owns a cemetery in Hagerstown, Maryland, and who built a funeral home that is now operated by his son. Because Brown is not licensed under the Morticians Act, he cannot own the funeral home he built, but he would like to do so through a corporation.

Jenkins is a Maryland resident who is licensed as a mortician. He is the supervising mortician of a funeral establishment in Prince George's County, Maryland, which was built by his family. He indicates that he would like to own his own funeral establishment through a corporation. He asserts that he cannot afford to buy the stock of a grandfathered corporation that owns a license because the going rate is "up to $250,000."

Chisholm is a former Maryland resident who now resides in Florida. He is licensed by Maryland as a mortician and owns a licensed funeral establishment in Timonium, Maryland. Since relocating to Florida in 2005, he states that his business has been operated by a "subcontractor . . . as the supervising mortician."

He would like to expand his funeral business in Maryland as an "ordinary business corporation."

Manuel is a Maryland resident who, through a corporation, owns a cemetery in Waldorf, Maryland. Although she is not a licensed mortician, Manuel would like to own and operate, through a corporation, a funeral establishment on the grounds of her cemetery because "owning a business through a corporation is the best way to operate." She states, however, that her plans cannot include paying the "exorbitant price, as much as $250,000," for the stock of a grandfathered corporation.

In short, each of the plaintiffs wants to engage in the practice of mortuary science through a corporation, and two wish to do so without becoming individually licensed. Therefore each is challenging Maryland's right to bar corporations from being licensed as morticians and owning licensed funeral establishments and to require the owner of a funeral establishment to be a "licensed individual."

The plaintiffs commenced this action against the Maryland State Board of Morticians and Funeral Directors ("Maryland") to declare the restrictions unconstitutional and to enjoin their enforcement. In their complaint, the plaintiffs allege that they have been denied equal protection of the law, in violation of the Equal Protection Clause of the Fourteenth Amendment, because there is no rational reason why they are not permitted to own funeral homes either through a corporate form when grandfathered

corporations can do so or as unlicensed individuals when surviving spouses and executors can do so. They also contend that the Morticians Act denies them the right "to earn an honest living in the occupation of their choice by imposing restrictions on the ownership of funeral homes that are not rationally related to any legitimate public purpose," in violation of the Due Process Clause of the Fourteenth Amendment. Finally, they allege that but for Maryland's restrictions on corporate and unlicensed individual ownership of funeral homes, persons and companies outside of the State "would pursue funeral home business opportunities in Maryland that they are not currently pursuing because of the restriction[s]. This substantial barrier to entry into the Maryland funeral home industry imposes an undue burden on interstate commerce in comparison with the legitimate local interests protected by the law, which in fact are none" and that therefore the restrictions on corporate and unlicensed individual ownership violate the dormant Commerce Clause.

On cross-motions for summary judgment, the district court rejected the plaintiffs' challenges to the Morticians Act under the Equal Protection and Due Process Clauses, concluding that "the Maryland General Assembly could have rationally determined that the public's health, safety and welfare are furthered by requiring that a licensed mortician own the funeral home where mortuary science is practiced." The court, however, sustained the plaintiffs' challenge to the Act's corporate ownership prohibition under the

dormant Commerce Clause, concluding that it is "a protectionist piece of legislation" that is "clearly anti-competitive." The court reasoned:

> The corporate prohibition severely limits the ability of out-of-state businesses from opening a funeral home in Maryland. Even if one of the fifty-eight licenses does become available, a prospective out-of-state purchaser must pay an inflated price for the license. The undisputed record in this case indicates that these burdens are intolerable and clearly excessive in relation to any benefits proffered by [Maryland].

The district court also held that the Morticians Act's requirement that funeral establishments be owned by licensed individuals was not properly challenged under the dormant Commerce Clause and that Maryland could require corporations wishing to own funeral establishments to be themselves owned by licensed funeral directors or morticians.

The plaintiffs appeal from the portion of the district court's judgment upholding the Maryland Morticians Act against equal protection and due process challenges, as well as the court's refusal to consider the licensed individual ownership requirement under the dormant Commerce Clause. And Maryland appeals from the portion of the judgment ruling that the corporate ownership restriction of the Morticians Act violates the dormant Commerce Clause. Because the district court struck down the

Morticians Act under the dormant Commerce Clause, we begin our analysis by addressing that issue.

II

The plaintiffs claim the following to support their argument that the Morticians Act's restrictions on corporate and unlicensed individual ownership of funeral establishments violate the dormant Commerce Clause: (1) that as a result of the restrictions, "the rate of out-of-state investment in the Maryland funeral industry is significantly lower than it would be absent the challenged restrictions"; (2) that the restrictions effectively exclude out-of-state funeral industry entrepreneurs "from the Maryland funeral market, despite their strong desire to enter it," because "the only practical way for out-of-state investors to own funeral homes in Maryland is through corporate ownership"; and (3) that "Maryland funeral industry insiders fought indefatigably for over a decade to prevent the General Assembly from eliminating these restrictions that suppress competition and supply the industry [in Maryland] with windfall profits." They conclude that in these ways the restrictions "impose significant burdens on interstate commerce without any countervailing public benefits," in violation of the dormant Commerce Clause.

Maryland responds that the restrictions on corporate and unlicensed individual ownership do not burden interstate commerce, "even if [they] result[ ] in greater costs or inefficiencies for certain companies."

It notes that "differences between Maryland's concededly 'even handed' and nondiscriminatory corporate licensure statute and the laws of other states are to be expected, and should not be mistaken for a 'burden' on interstate commerce." Maryland argues that the restrictions on funeral establishment ownership are rationally justified because the use of corporations "causes such business to be owned by people who do not know anything about" the business and because the restrictions foster a greater degree of accountability to regulators. It claims that the Maryland General Assembly had a rational basis for believing that "limiting funeral home licenses to *licensed individuals* would foster a greater degree of accountability to regulators than would the continued licensing of corporations, which are inherently designed to limit the personal responsibility of owners. That rational legislative judgment could reasonably be expected to yield putative benefits by allowing the [Morticians'] Board to better 'protect the health and welfare of the public.'" (Quoting Md. Health Occ. Code § 7-103).

The Commerce Clause states, "The Congress shall have Power . . . To regulate Commerce . . . among the several States," U.S. Const. art. I, § 8, cl. 3, and it is well-established that this affirmative grant of authority implies a "negative" or "dormant" constraint on the power of the States to enact legislation that interferes with or burdens interstate commerce. *See Dennis v. Higgins*, 498 U.S. 439, 447 (1991) ("It is also clear, however, that the Commerce

Clause does more than confer power on the Federal Government; it is also a substantive restriction on permissible state regulation of interstate commerce" (internal quotation marks and citation omitted)); *Healy v. Beer Inst.*, 491 U.S. 324, 326 n.1 (1989) ("This Court long has recognized that this affirmative grant of authority to Congress also encompasses an implicit or 'dormant' limitation on the authority of the States to enact legislation affecting interstate commerce"). As the Supreme Court recently observed, "The modern law of what has come to be called the dormant Commerce Clause is driven by concern about economic protectionism – that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *Dep't of Revenue of Ky. v. Davis*, 128 S. Ct. 1801, 1808 (2008) (internal quotation marks and citation omitted). The dormant Commerce Clause walks a narrow path leading courts to "rebuff[ ] attempts of states to advance their own commercial interests by curtailing the movement of articles of commerce, either into or out of the state, while generally supporting their right to impose even burdensome regulations in the interest of local health and safety." *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 535 (1949). Thus, not all economic harms or anticompetitive choices are remedied through the application of the dormant Commerce Clause, but rather only those that *unjustifiably burden* inter-state commerce.

The analysis for determining whether a state law violates the dormant Commerce Clause proceeds on

two tiers. On the first tier, it inquires whether the state law *discriminates* against interstate commerce. Unless discrimination is demonstrably justified by a factor unrelated to economic protectionism, a "discriminatory law is virtually *per se* invalid." *Davis,* 128 S. Ct. at 1808 (internal quotation marks and citation omitted); *see also Yamaha Motor Corp., U.S.A. v. Jim's Motorcycle, Inc.,* 401 F.3d 560, 567 (4th Cir. 2005). If there is no discrimination, a court will consider on the second tier whether the state laws "unjustifiably . . . burden the interstate flow of articles of commerce." *Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality of Oregon,* 511 U.S. 93, 98 (1994); *see also Yamaha,* 401 F.3d at 567. In addressing whether a state law unjustifiably burdens interstate commerce, the courts generally apply the so-called *Pike* test, under which the challenged law "will be upheld unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.,* 397 U.S. 137, 142 (1970).

In this case, no contention is made that the Morticians Act discriminates against interstate commerce, and the district court concluded that there was no evidence of any discriminatory purpose. Rather, the issue presented is whether the corporate and individual licensure restrictions in the Morticians Act burden interstate commerce, and, if so, whether the burden is "clearly excessive" and not justified by putative local benefits. We begin that inquiry by

identifying the commerce implicated and how the Morticians Act purportedly burdens it.

The Morticians Act regulates the practice of mortuary science in Maryland, which includes the operation of funeral establishments, the preparation of dead bodies for disposition, and the arrangement for final disposition of dead bodies. *See* Md. Health Occ. Code §§ 7-301(a), 7-302, 7-101(p),(q). The practice of mortuary science is inherently a local profession, typically used by relatives to have the bodies of dead family members prepared for burial or other disposition and to provide a facility for visitation, mourning, and services. Indeed, other than providing out-of-state caskets, which are not in any way regulated by the Morticians Act, the service provided through the practice of mortuary science begins and ends within the State.

In licensing the profession and the establishments at which it is practiced, the Maryland Morticians Act does not purport to regulate activity outside of Maryland, and it focuses only on the services provided in Maryland at a funeral establishment in Maryland. Importantly, the regulation does not address, nor thereby affect, the flow of any goods or articles of commerce across state lines. The regulation concerns itself only with the provision of services from a physical establishment in the State. Thus, the Morticians Act purports to regulate an industry that is inherently local, not interstate, in nature.

Moreover, the Morticians Act does not treat persons from out-of-state any differently than persons in-state. Any person – out-of-state or in-state – may obtain a license to practice mortuary science and own and operate a funeral establishment in Maryland, and there is no limit on the number of licenses that the State may issue. Likewise, with respect to the 58 grandfathered corporations owning licenses, any person or corporation, out-of-state or in-state, may own the stock. Indeed, over one-half of the grandfathered corporations are owned by publicly-held out-of-state corporations.

In sum, any individual may practice mortuary science in Maryland, own a funeral establishment in Maryland, or own the stock of a grandfathered corporation holding a Maryland license to operate a funeral establishment. The only restrictions that are imposed by the Morticians Act relate to professional education, experience, and accountability. Thus, entry into the Maryland funeral services market is limited only by the choices of the individual as to how best to allocate his or her time and resources.

The dormant Commerce Clause is implicated by burdens placed *on the flow of interstate commerce* – the flow of goods, materials, and other articles of commerce across state lines. *See Oregon Waste Sys.*, 511 U.S. at 98 (stating that the dormant Commerce Clause "denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce"); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 803 (1976) (noting that it is "well

established by the history of the Commerce Clause, that this Nation is a common market in which state lines cannot be made barriers to the free flow of both raw materials and finished goods in response to the economic laws of supply and demand"). And it is a trade barrier to the free flow of goods, materials, and other articles of commerce across state lines that violates the dormant Commerce Clause. The Clause does not purport to restrict or limit intrastate commerce, nor protect the participants in intrastate or interstate markets, nor the participants' chosen way of doing business. *See Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 127 (1978) ("We cannot . . . accept appellants' underlying notion that the Commerce Clause protects the particular structure or methods of operation in a retail market" or "particular interstate firms").

Yet, it is precisely the particular structure or methods of operation in the Maryland retail market for funeral services about which the plaintiffs in this case complain, not about a burden on the flow of articles of commerce across state lines. Their complaints about the regulation center around either the inconveniences presented to them personally or the restrictions on how they would prefer to run their businesses when operating in Maryland.

They assert that corporate ownership of funeral establishments would facilitate financing, would protect them from personal liability, and would enable them to pass the business on to others, particularly family members. In addition, they state that

operating through a corporation would simply be a preferable way of doing business. Brown states, "I want to own and operate a funeral establishment on the grounds of Rest Haven Cemetery, but I do not want to become a licensed mortician." Jenkins states, "It is no coincidence that the largest funeral establishments in Maryland . . . are set up through the 58 special corporate licenses under the 'grandfather' clause. I simply want to be able to do what the law allows those businesses and businesspeople to do." Chisholm, who is a mortician licensed in Maryland but who lives in Florida, states, "[T]he challenges of running a Maryland business from Florida, particularly with respect to financing and liability, make corporate ownership essential if I am to expand Chisholm Funeral Services according to my plans." And Manuel states: "Neither my husband nor I want to devote the time and money to becoming licensed funeral directors or morticians. . . . Ideally, we want to own and operate our proposed funeral home as an ordinary business corporation . . . [but] [o]ur plans do not allow us to pay the exorbitant price, as much as $250,000, that one of these 'grandfather' corporations cost."

In short, the plaintiffs are challenging the way Maryland authorizes them to do business within the State in a profession regulated by the State. Their complaints do not involve burdens placed on the interstate movement of goods, materials, or other articles of commerce, and the matters of which they complain-the manner of professional practice in

Maryland-are not matters protected by the dormant Commerce Clause. As the Supreme Court stated in *Exxon,* "We cannot . . . accept appellants' underlying notion that the Commerce Clause protects the particular structure or methods of operation in a retail market. . . . [T]he Clause protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations." *Exxon,* 437 U.S. at 127-28.

In *Exxon,* a Maryland statute provided that producers or refiners of petroleum products, such as Exxon and Shell, could not operate retail service stations within Maryland. Exxon and other petroleum producers and refiners challenged the statute on constitutional grounds, including the dormant Commerce Clause, pointing to evidence that the statute's divesture requirements would cause at least three refiners to stop selling gasoline in Maryland, depriving consumers of competition and even certain special services. The Supreme Court rejected the argument, noting that "interstate commerce is not subjected to an impermissible burden simply because an otherwise valid regulation causes some business to shift from one interstate supplier to another," even if it will "change the market structure by weakening independent refiners." *Exxon,* 437 U.S. at 127. The Court explained:

> [T]he Clause protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations. It may be true that the consuming public will be

> injured by the loss of the high-volume, low-priced stations operated by the independent refiners, but again that argument relates to the wisdom of the statute, not to its burden on commerce.

Id. at 127-28.

Likewise in the case before us, the Morticians Act "does not prohibit the flow of interstate goods, place added costs upon them, or distinguish between in-state and out-of-state companies in the retail market." *Exxon*, 437 U.S. at 126. In fact, large funeral home conglomerates have a presence in the Maryland funeral services market, albeit not as large as they would like. But the fact that the burden of this permissible state regulation falls on corporations that may have interstate operations "does not, by itself, establish a [violation of the dormant Commerce Clause]." *Id.*

Further, just like the oil companies in *Exxon*, the plaintiffs complain that the Morticians Act hurts Maryland consumers and drives up the costs of funerals. The burden of this regulation, however, falls on *Maryland consumers*, not on *interstate commerce*, and a complaint about this burden "relates to the *wisdom* of the [Maryland] statute, not to its burden on [interstate] commerce." *Exxon*, 436 [sic] U.S. at 128 (emphasis added).

The plaintiffs rely heavily on our decision in *Yamaha Motor Corp., U.S.A. v. Jim's Motorcycle, Inc.*, 401 F.3d 560 (4th Cir. 2005), to support their claim

that the Morticians Act violates the dormant Commerce Clause. They assert that *Yamaha,* which struck down a Virginia statute under the dormant Commerce Clause, is "directly on-point and provided the legal basis for the district court's commerce clause ruling" in this case.

In *Yamaha,* the Virginia statute at issue provided protection to existing motorcycle dealers in Virginia against the creation of new dealerships by motorcycle manufacturers and distributors such as Yamaha and Harley-Davidson, by giving the existing dealers the right to protest the creation of a new dealership through a process that "could take years to resolve," even if the protest were "frivolous." *Yamaha,* 401 F.3d at 571 (internal quotation marks and citation omitted). Moreover, a dealer could protest the appointment of a new dealer even if the new dealership were across the State, some 500 miles away and indisputably outside of the relevant market of the protesting dealer for selling motorcycles. *Id.* Yamaha, an out-of-state manufacturer and distributor of motorcycles, challenged the statute under the dormant Commerce Clause, arguing that the Virginia statute created an unjustifiable burden on interstate commerce by burdening Yamaha's ability to distribute motorcycles in Virginia. Agreeing with Yamaha's claim, we concluded that the Virginia statute did indeed "create[ ] a significant barrier to market entry . . . because of the virtual certainty of a protest whenever a manufacturer attempts to authorize a new dealership." *Id.* (internal quotation marks and

citations omitted). Because the delay in costs in the face of increasing demand in Virginia for motorcycles caused Yamaha and Harley-Davidson to forego establishing new dealers, we concluded that the Virginia statute imposed "heavy burdens predominantly on out-of-state interests" and thus "unduly burden[ed] commerce." *Id.* at 573.

Thus, *Yamaha* invalidated a statute that was aimed at the *interstate flow* of motorcycles into Virginia. Unlike in *Yamaha,* however, the Maryland Morticians Act is not aimed at any interstate flow of goods, materials, or articles of commerce. The Morticians Act is a local regulation of a localized profession where services are performed for clients entirely in Maryland. Rather than aiming at the interstate flow of commerce, the Morticians Act is aimed at making morticians and funeral directors in Maryland directly accountable to clients who come to them in Maryland to provide funeral services at their funeral establishments in Maryland. *Yamaha* does not advance the plaintiffs' argument that the Morticians Act imposes an unjustified burden on interstate commerce.

Because the Morticians Act does not place a barrier or burden on the flow of interstate commerce, it does not violate the dormant Commerce Clause. But even if it was considered to place an incidental burden on commerce, that incidental burden would not be excessive in light of the putative benefits from the Act's regulation.

While Maryland does not have extensive records explaining the purpose of the Act, the Supreme Court has recognized that promoting familiarity between an owner and his business in a licensed and regulated industry is a legitimate local interest. *See North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 166-67 (1973); *see also Goldfarb v. Supreme Court of Va.*, 766 F.2d 859, 862 (4th Cir. 1985) (recognizing that a state law exempting from examination lawyers licensed out of state who moved into Virginia to practice full time provides a putative local benefit because "the full-time practice requirement promotes familiarity with Virginia law among attorneys who have not passed the state bar examination"); *id.* (recognizing the "broad power [of States] to establish standards for licensing practitioners and regulating the practice of professions" (internal quotation marks and citation omitted)). More broadly, a State "has a substantial interest in preventing the corporate form from becoming a shield for unfair business dealing." *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 93 (1987). The district court recognized that these very principles apply in this case to support "the notion that ownership of corporations may be limited in highly skilled occupations where licensing is required, such as mortuary science."

Maryland asserts that "limiting funeral home licenses to licensed individuals [will] foster a greater degree of accountability to regulators than would the continued licensing of corporations, which are

inherently designed to limit the personal responsibility of owners. That rational legislative judgment could reasonably be expected to yield putative benefits by allowing the [Morticians'] Board to better 'protect the health and welfare of the public.'" (Quoting Md. Health Occ. Code § 7-103). And the State's position is indeed advanced by the complaint in this case and the affidavits of the plaintiffs where they assert that they desire to use the corporate form because they "want to be insulated from personal liability for . . . negligence." This is precisely the kind of personal responsibility that the Morticians Act wishes to maintain. Indeed, the Maryland State Board of Morticians expressed this concern, claiming that unlicensed individuals and corporations would be less accountable. Thus, the Morticians Act provides individual liability and therefore more direct accountability for owners of funeral establishments while the plaintiffs desire less individual liability. This is the type of legislative decisionmaking into which courts should avoid inserting themselves. *See, e.g., Powers v. Harris*, 379 F.3d 1208, 1222 (10th Cir. 2004) ("While the creation of such a libertarian paradise may be a worthy goal, Plaintiffs must turn to the . . . electorate for its institution, not us").

In short, we conclude that the Morticians Act's incidental burden on interstate commerce is not excessive and is justified by the very real benefits of protecting the public health, safety, and welfare by encouraging familiarity of the owner of a funeral business with the day-to-day workings of that business

and creating accountability to regulators and to clients. Accordingly, we reverse the district court's conclusion that the Act violates the dormant Commerce Clause.

III

In addressing plaintiffs' Due Process and Equal Protection Clause arguments, we agree with the district court's reasoning rejecting these arguments. Because the Morticians Act is an economic regulation, we may not strike it down unless it is "wholly arbitrary, without any basis in reason." *Guardian Plans Inc. v. Teague,* 870 F.2d 123, 126 (4th Cir. 1989) (internal quotation marks and citation omitted). In other words, to survive such challenges, the Act need only be "rationally related to a legitimate state interest." *Id.*

Our court has already recognized that a State has a "legitimate interest in protecting the health, safety and welfare of its citizens through regulation of the funeral profession." *Guardian Plans,* 870 F.2d at 126. A State's legislature may "rationally determine[ ] that keeping the arrangement of funerals in the hands of licensed funeral professionals would benefit the public by ensuring competence in funeral arrangement. Our inquiry [under the Equal Protection and Due Process Clauses] ends here." *Id.*

Moreover, there is a rational basis to restrict corporate and unlicensed individual ownership of professional businesses. *See North Dakota Pharmacy*

Bd., 414 U.S. at 166-67. In *North Dakota Pharmacy Board*, the North Dakota legislature required that in order to obtain a permit to operate a pharmacy, the applicant had to be a registered pharmacist in good standing or a corporation or association, the majority of whose stock must be owned by registered pharmacists in good standing who are active in the day-to-day affairs of the corporation or association. In upholding those restrictions on corporate ownership, the Supreme Court explained that a rational relationship exists between restricting corporate ownership and the professions, quoting with approval Justice Holmes' dissenting opinion in *Louis K. Liggett Co. v. Baldridge*, 278 U.S. 105, 114-15 (1928) (Holmes, J. dissenting):

> "A standing criticism of the use of corporations in business is that it causes such business to be owned by people who do not know anything about it. Argument has not been supposed to be necessary in order to show that the divorce between the power of control and knowledge is an evil. The selling of drugs and poisons calls for knowledge in a high degree, and [the State] after enacting a series of other safeguards has provided that in that matter the divorce shall not be allowed. Of course, notwithstanding the requirement that in corporations hereafter formed all the stockholders shall be licensed pharmacists, it still would be possible for a stockholder to content himself with drawing dividends and to take no hand in the company's affairs. But obviously he would be

> more likely to observe the business with an intelligent eye than a casual investor who looked only to the standing of the stock in the market. The Constitution does not make it a condition of preventive legislation that it should work a perfect cure. It is enough if the questioned act has a manifest tendency to cure or at least to make the evil less."

North Dakota State Bd., 414 U.S. at 166-67. The same rationality exists for upholding the restrictions on corporate and unlicensed individual ownership in the Morticians Act.

The rationality of restricting corporate ownership in the Morticians Act is not undermined by exemptions contained in the Act, so long as the exemptions too are rationally based. *See Goldfarb*, 766 F.2d at 862-63 (finding rational an exemption from a state bar exam for out-of-state lawyers who moved to Virginia to practice full time even though bar applicants generally must take the bar exam before being licensed).

In the Morticians Act, corporations that historically held licenses in the funeral business were allowed to continue to hold licenses because the General Assembly wanted to protect reliance interests of family members. For a similar reason, spouses of deceased licensees are exempted from being licensed to allow the spouse, who presumably was already involved in the affairs of the business, to continue the business. The Act also provides an exemption for executors of licensees, allowing the

temporary operation of the funeral establishment to wind down the affairs of the business. The fact that the General Assembly created these rational exemptions does not undermine the overall rationality of the Morticians Act based on its relationship to a legitimate government purpose. *See Goldfarb,* 766 F.2d at 862-63.

The plaintiffs' position boils down to a disagreement with the General Assembly's judgment in refusing to authorize a different structure for practicing mortuary science in Maryland. This disagreement, however, is not a basis on which to render the Morticians Act unconstitutional.

> [A] law may exact a needless, wasteful requirement in many cases. But it is for the legislature, not the courts, to balance the advantages and disadvantages of the . . . requirement.
>
> * * *
>
> [T]he law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.
>
> The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of

> thought. . . . For protection against abuses by legislatures the people must resort to the polls, not to the courts.

Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 487-88 (1955) (internal quotation marks and citations omitted).

IV

We conclude that the Morticians Act does not violate the dormant Commerce Clause, and accordingly we reverse the district court's judgment in that regard. We also conclude that the Act does not violate either the Equal Protection Clause or the Due Process Clause, and accordingly we affirm the district court in that regard.

The judgment of the district court is therefore

AFFIRMED IN PART AND REVERSED IN PART.

SHEDD, Circuit Judge, concurring:

I concur in the judgment reached by the majority. As to the dormant Commerce Clause issue, I concur to the extent that we find "that the Morticians Act's incidental burden on interstate commerce is not excessive and is justified by the very real benefits of protecting the public health, safety, and welfare by encouraging familiarity of the owner of a funeral business with the day-to-day workings of that

business and creating accountability to regulators and to clients." *See Majority Op.* at 18.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CHARLES BROWN, *et al.*,	*	
Plaintiffs,	*	
v.	*	Civil Action No.: RDB-06-524
DAVID HOVATTER, *et al.*,	*	
Defendants.	*	

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MEMORANDUM OPINION

(Filed Oct. 17, 2007)

Plaintiffs Charles Brown, Brian Chisolm, Joseph B. Jenkins, III, and Gail Manuel (collectively "Plaintiffs") bring this civil rights lawsuit pursuant to Article I, Section 8 and the Fourteenth Amendment of the United States Constitution, the Civil Rights Act of 1871, 42 U.S.C. § 1983, and 28 U.S.C. § 2201, seeking declaratory and injunctive relief against David Hovatter, in his official capacity as President of the Maryland State Board of Morticians, and Faye Peterson, Michael Ruck, Sr., Gladys Sewell, Donald V. Borgwardt, Marshall Jones, Jr., Michael Kruger, Brian Haight, Robert Bradshaw, Jeffery Pope, and Vernon Strayhorn, Sr., in their official capacities as members of the Maryland State Board of Morticians

(collectively "Defendants").[1] In this case, Plaintiffs challenge the constitutionality of two provisions of the Maryland Morticians Act, Md. Code Ann., Health Occ. §§ 7-101-602 (the "Act" or the "Morticians Act"), that limit ownership and operation of funeral homes in Maryland. This Court has granted the motion of the International Cemetery, Crematory and Funeral Association ("ICCFA") to file an *amicus curiae* brief in support of the Plaintiffs' complaint. Plaintiffs contend that the provisions prohibiting corporations from owning and operating funeral homes, as set forth in sections 7-309(a) and 7-309(b) of the Morticians Act, violate the Commerce Clause[2] and the Due Process and Equal Protection Clauses of the Fourteenth Amendment[3] of the United States Constitution. In addition, Plaintiffs argue that section 7-310 of the Morticians Act violates the Due Process and Equal Protection Clauses because it permits funeral home ownership only by "licensed individuals," who are defined as licensed morticians, licensed funeral directors, or their surviving spouses and executors of their estates.

Pending before this Court are the parties' cross motions for summary judgment, which have been fully briefed by the parties. A hearing was held on

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[1] By order of December 8, 2006, this Court granted the motion of John Armiger to withdraw as a plaintiff in this action. (Paper No. 24.)

[2] U.S. Const. art. I, § 8, cl. 3.

[3] U.S. Const. amend. XIV, § 1.

September 10, 2007, at which time counsel for all the parties agreed that there are no genuine issues of material fact and that the case is ripe for determination by this Court as a matter of law. The respective motions for summary judgment by the parties are both GRANTED IN PART and DENIED IN PART.

For the reasons that follow, this Court holds that sections 7-309(a) and 7-309(b) of the Morticians Act, which prohibit corporate ownership of funeral homes in Maryland with indefinite exemptions for corporations holding licenses existing as of June 1, 1945, violate the dormant Commerce Clause of the United States Constitution. Defendants and their successors are hereby enjoined from prohibiting or limiting the corporate ownership of funeral homes in Maryland. For the reasons that follow, this Court holds that section 7-310 of the Morticians Act, which establishes a licensing scheme for the operation of funeral homes in Maryland, is rationally related to a legitimate state interest and does not violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The licensing requirement may be imposed upon corporate and non-corporate owners of funeral homes in Maryland. Accordingly, summary judgment will be GRANTED for Plaintiffs with respect to their challenge to sections 7-309(a) and 7-309(b) of the Morticians Act, and GRANTED for Defendants with respect to their defense of section 7-310 of the Morticians Act.

BACKGROUND

I. The Regulatory Scheme

The stated purpose of the Morticians Act "is to protect the health and welfare of the public." Md. Code Ann., Health Occ. § 7-103. The Morticians Act establishes a comprehensive scheme for the regulation of the funeral home industry and is enforced by the State Board of Morticians, of which Defendants are members. *Id.* §§ 7-201-205.

In 1971, the Morticians Act was amended to require that a funeral home must be licensed by the State Board of Morticians before commencing operations. Ch. 443, 1971 Md. Laws. In its current form, the Morticians Act provides as follows:

> A funeral establishment shall be licensed by the [State Board of Morticians] before the establishment may be used for the preparation of the remains, viewing, and conducting of services.[4]

Md. Code Ann., Health Occ. § 7-310(a)(1). The Morticians Act limits who may obtain a funeral home license by requiring that every application be signed by a "licensed individual" who is also "the owner or

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[4] The Morticians Act uses the term "funeral establishment" to mean "any building, structure, or premises from which the business of funeral directing or embalming is conducted." Md. Code Ann., Health Occ. § 7-101(h). The parties have referred to a "funeral establishment" by the more colloquial "funeral home," and this Court will likewise use the terms synonymously.

co-owner of the establishment to be licensed." *Id.* § 7-310(b)(2). There are four classes of "licensed individuals": (1) a licensed mortician, *id.* § 7-302; (2) a licensed funeral director, *id.* § 7-307;[5] (3) the surviving spouse of a deceased mortician or funeral director, *id.* § 7-308; or (4) the executor of the estate of a deceased mortician, *id.* § 7-308.1.

In order to become a licensed mortician, an applicant must obtain an associate of arts degree, complete a one- or two-year apprenticeship with a Maryland mortician, and pass both the national examination administered by the American Board of Funeral Service Education and a separate Maryland law and regulations examination. *Id.* § 7-303(b).[6] The surviving spouse license requires only that the applicant pass the Maryland law and regulations examination. *Id.* § 7-308(b). The executor license does not require passing any examination, but the license expires after six months. *Id.* § 7-308.1(f). Because the

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[5] There is very little statutory difference between a mortician and a funeral director. The Morticians Act defines a mortician as "an individual who practices mortuary science," *id.* § 7-101(o), and a funeral director as "an individual who is licensed by the Board to practice all aspects of mortuary science except for embalming." *Id.* § 7-101(g). The parties have used the term mortician to encompass both morticians and funeral directors, and this Court will use the terms synonymously to encompass both meanings.

[6] The State Board of Morticians no longer grants funeral director licenses. The funeral director licenses that currently exist were issued before May 2, 1973 and have been renewed biannually ever since. *Id.* § 7-307.

holder of a surviving spouse or executor license is not required to be qualified to practice mortuary science, the Morticians Act mandates that the holder of either license employ a supervising mortician at the funeral home. *Id.* §§ 7-308(e)(1); 7-308.1(e)(1).

The Morticians Act generally prohibits corporations from owning and operating funeral homes:

> Except as otherwise provided by law, a corporation may not operate a mortuary science business and the [State Board of Morticians] may not issue a license to or list any corporation as licensed to operate a mortuary science business.

Id. § 7-309(a); *see also id.* § 7-101(q)(i) (defining the phrase "[p]ractice mortuary science" as "[t]o operate a funeral establishment"). Corporations that held a license as of June 1, 1945, however, are exempt from the general prohibition on corporate ownership:

> The [State Board of Morticians] may renew only the license of a corporation that:
>
> (1) On June 1, 1945, held a license issued by this State;
>
> (2) Has been renewed continuously since that date;
>
> (3) Submits an application on a form required by the [State Board of Morticians]; and

(4) Pays a fee set by the [State Board of Morticians].[7]

Id. § 7-309(b). The general corporate prohibition and the exemption apply equally to licensed and unlicensed individuals. In other words, although one must be a "licensed individual" to own a funeral home in every other context, *see id.* § 7-310(b)(2), there is no corresponding provision requiring that the owner of an exempt corporate license be a "licensed individual." Nevertheless, the practice of mortuary science on the premises must at all times be conducted by a licensed mortician. *Id.* § 7-309(d). In sum, funeral home ownership in Maryland requires that an individual complete the demanding mortician licensing requirements, fall into one of the established status exceptions (*i.e.* surviving spouse or executor), or purchase an exempt corporate license.

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[7] This provision was enacted in two separate pieces of legislation. Before 1937, Maryland funeral homes could freely incorporate, but the Maryland General Assembly amended the Morticians Act that year to prohibit further corporate licensing. Ch. 306, 1937 Md. Laws. The amendment provided that "[t]he Board shall not hereafter issue licenses to, nor register any corporation, nor shall any corporation be permitted to conduct the business or profession of Funeral Directing which has not already been licensed and registered." In 1945, the Maryland General Assembly granted additional corporate licenses to "any person who was licensed as a funeral director and was engaged in the business of funeral directing or embalming at the time of induction into the Armed Forces of the United States during World War II." Ch. 741, 1945 Md. Laws.

In their submissions to the Court, the parties agree that there are currently 283 funeral home licenses in Maryland. (Def. Ex. 16; Sheffield-James Aff. ¶ 3-4.) Of those, licensed morticians or funeral directors hold 214, corporate licensees hold fifty-eight, and surviving spouses licensees hold eleven. (*Id.*) Publicly held corporations and national chains own thirty of the fifty-eight corporate licenses, while the remaining twenty-eight are owned by privately held Maryland corporations. (*Id.*) There is no sunset provision on the corporate exemption, so corporations that held licenses as of June 1, 1945 may retain their exemption indefinitely. Moreover, the corporation (along with its license) is freely transferrable regardless of whether the purchaser is a "licensed individual" under section 7-310(b)(2).

The Morticians Act's restriction on corporate ownership is unique. The only other state that has a similar prohibition on the corporate ownership of funeral homes is New Hampshire. The New Hampshire statute makes clear that "no corporation . . . shall be issued a license as a funeral director," except for "any corporation licensed prior to January 1, 1953." N.H. Rev. Stat. Ann. § 325:15. Pennsylvania's statute provides that all of the corporation's "shareholders [must be] licensed funeral directors or the members of the immediate family of a licensed funeral director." 63 Pa. Stat. Ann. § 479.8. Therefore, unlike both Maryland and New Hampshire, the Pennsylvania statute regulates only who owns the corporation, but not how many corporations can

operate funeral homes. No other state restricts corporate ownership quite like Maryland and New Hampshire.

II. Efforts to Amend the Morticians Act

The Morticians Act ownership provisions have survived previous judicial and legislative challenges. In 1960, a licensed mortician named L. Scott Brooks formed a corporation and applied for a corporate license to the State Board of Funeral Directors and Embalmers, the former name of the State Board of Morticians. Citing the statutory prohibition on corporate ownership, the Board denied his request, but Brooks nonetheless began operating his corporate funeral home. The Board subsequently suspended his mortician's license for one year. Brooks appealed the suspension to the Court of Appeals of Maryland in the case of *Brooks v. State Board of Funeral Directors and Embalmers,* 195 A.2d 728 (Md. 98) (1963). The Court of Appeals upheld the corporate prohibition, writing that:

> It may at first blush seem strange that the legislature permits some corporations to conduct the business of a funeral director, but refuses to permit others to do so. One of the two kinds of corporations . . . is established under a grandfather clause; the other was designed to preserve the assets and going concern value of the business of men engaged in the service of the country during war. The exceptions in favor of each of these

> types of corporations had the purpose of preserving existing investments or values. We are of the opinion that this purpose is sufficient to sustain their separate classification.

Id. at 737. Accordingly, the Court of Appeals held that the corporate prohibition did not violate the Due Process or Equal Protection Clauses of the Fourteenth Amendment. *Id.* at 739. This 1963 decision by Court of Appeals did not address the corporate prohibition and its validity in light of the dormant Commerce Clause of the United States Constitution.

In 1996, the Maryland General Assembly created the Task Force to Examine the State's Cemetery and Funeral Industry to assess the regulation of the funeral industry in Maryland and other states. The Task Force concluded, *inter alia*, that "Maryland law [should] be changed to allow the issuance of additional corporate licenses for the ownership and operation of funeral homes." Final Report of the Task Force to Examine the State's Cemetery and Funeral Industry, at 22-23 (Dec. 1996). The Final Report set off a flurry of legislative reform proposals. Bills proposing the deregulation of entry barriers into the Maryland funeral market industry were proposed in every year from 1997 through 2005, but none of these measures ever made it out of committee for a full vote

of the Maryland House of Delegates or the Maryland State Senate.[8]

The State Board of Morticians and the Maryland State Funeral Directors Association ("MSFDA") have consistently opposed legislative reform. The State Board of Morticians is comprised of eight licensed morticians and four consumer members. Md. Code Ann., Health Occ. § 7-202(a). At least two members of the current State Board of Morticians have a direct interest in maintaining the prohibition on corporate ownership.[9] Moreover, there is significant overlap between the State Board of Morticians and the MSFDA. In fact, seven of the eight licensed morticians sitting on the State Board of Morticians are members of the Maryland State Funeral Directors Association. Thus, Plaintiffs contend that "the obvious financial interest these members had in maintaining the general prohibition on corporate ownership presents a troubling gloss on the Board's

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[8] In fact, thirteen separate bills were introduced. *See* Sen. 340, 420th Sess. (Md. 2005); H.B. 795, 418th Sess. (Md. 2004); H.B. 1341, 418th Sess. (Md. 2004); H.B. 956, 417th Sess. (Md. 2003); H.B. 1113, 417th Sess. (Md. 2002); H.B. 1036, 415th Sess. (Md. 2001); H.B. 1464, 415th Sess. (Md. 2001); H.B. 188, 414th Sess. (Md. 2000); H.B. 503, 414th Sess. (Md. 2000); H.B. 107, 413th Sess. (Md. 1999); H.B. 475, 413th Sess. (Md. 1999); H.B. 591, 412th Sess. (Md. 1998); H.B. 321, 412th Sess. (Md. 1997).

[9] Defendant Kruger works for a corporate-owned funeral home, and Defendant Ruck owns three corporate licenses himself. (Pl. Ex. 21, Ruck Dep. 10:9-10:10.)

consistent opposition to the legislative reform measures." Pls.' Mem. Supp. Summ. J. at 15.

Plaintiffs present this evidence as a prototypical example of "regulatory capture," a term coined by public choice economists to indicate when members of a regulated occupation also dominate the regulatory and law-making process in their field. Professor Todd Zywicki of George Mason University School of Law, a leading scholar in law and economics, testified that the limitations on funeral home ownership in Maryland are consistent with the principles of regulatory capture. He stated that in his opinion the Morticians Act appears to be:

> an effort to create governmentally imposed barriers to entry in the funeral home industry and thereby to transfer wealth to a discrete, well-organized interest group at the expense of consumers of funeral home services and the public at large. The result of this regulation is reduced competition in the provision of funeral home services and higher prices and reduced choice in funeral home products and services for consumers.

(Pl. Ex. 7, Zywicki Decl. ¶ 9.)

III. The Practical Effect of the Morticians Act

At the hearing on September 10, 2007, counsel for the Defendants did not dispute Plaintiffs' credible evidence indicating that the fifty-eight corporate licenses are quite valuable, in large part because of

the market premium that results from their insulated and protected status. For example, the Department of Legislative Services of the Maryland General Assembly has consistently valued each of the corporate licenses, excluding assets, at between $150,000 to $200,000. *See, e.g.* Fiscal Notes for H.B. 1113, 417th Sess. (Md. 2002) (concluding that "[b]ecause entry into the corporate market is restricted and there is greater demand for corporate licenses than there are licenses, corporate licenses are currently traded at a value between $150,000 to $200,000"); *see also* Fiscal Notes for H.B. 188, 414th Sess. (Md. 2000); H.B. 503, 414th Sess. (Md. 2000); Fiscal Notes for H.B. 107, 413th Sess. (Md. 1999); Fiscal Notes for H.B. 591, 412th Sess. (Md. 1998); Fiscal Notes for H.B. 321, 412th Sess. (Md. 1997). Plaintiffs have also submitted the testimony of Defendant Ruck, who paid $148,000 for a licensed corporation, excluding all assets except name, and $30,500 for a second licensed corporation with no assets whatsoever. (Pl. Ex. 21, Ruck Dep. 56.15-57.11.) Erich March, a prominent Maryland mortician, testified that he was personally aware that a corporate license sold for $250,000 more than a decade ago and Defendant Jones acknowledged that one may sell for upwards of $300,000.[10] (Pl. Ex. 28, March Dep. 36:13-14; Ex. 17, Jones Dep. 62:19-20.)

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[10] The remainder of Plaintiffs' evidence supporting this argument is too speculative to influence a motion for summary judgment, including the testimony of Earl Canapp, the legislative chair of the MSFDA. *See Williams v. Griffin*, 952 F.2d 820,

(Continued on following page)

Data collected by the United States Census Bureau indicates that a funeral in Maryland costs approximately $800 more than the national average, a price increase that partly reflects the anti-competitive nature of the Maryland funeral home industry. (Pl. Ex. 6, Harrington Decl. ¶¶ 20-30.) In response to a request by Delegate Joanne C. Bensen, who at the time was anticipating a vote on proposed House Bill 795, the staffs of the Federal Trade Commission's Bureau of Competition, Bureau of Consumer Protection, Bureau of Economics and the Office of Policy Planning drafted a letter that concluded that "consumers would likely benefit from having increased competition in the market for funeral home services" and that reforming the statute would not "undermine Maryland's efforts to ensure that consumers are served by capable and professionally run funeral homes." (Pl. Ex. 3, FTC Letter to Delegate Benson, at 3.)

The benefits of the corporate form are well known and uncontested, and apply in equal force to the Maryland funeral home industry. These benefits include free transferability, limited liability, tax advantages, perpetual existence, and the superior ability to raise capital through stock sales. Given the advantages of incorporation, it is unremarkable that,

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823 (4th Cir. 1991) (stating that testimony in opposition to a summary judgment motion must set forth specific facts based on personal knowledge).

at an absolute minimum,[11] fifty-one percent of funeral homes nationwide are registered in the corporate form. (Harrington Decl. ¶ 16.) Despite these advantages, however, only twenty-one percent of funeral homes in Maryland are owned by corporations. (*Id.*)

IV. Procedural History

Plaintiff Brown and Plaintiff Manuel are prevented from owning a funeral home because they are not "licensed individuals," and challenge the licensing requirements of section 7-310 of the Morticians Act under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Plaintiff Chisholm and Plaintiff Jenkins, although licensed morticians, are unable to open a funeral home in the corporate form because they do not own one of the fifty-eight exempt corporate licenses. As such, they challenge section 7-309(a) of the Morticians Act under the Due

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[11] Professor David Harrington, an economist who specializes in the funeral industry, explained that the United States Census Bureau conducts an extensive survey of the funeral industry every five years. (Harrington Decl. ¶ 16 n. 1.) The results are split into two groups: firms with paid employees and firms without paid employees. (*Id.*) Only the ownership status of firms with paid employees is released. (*Id.*) In 2002, over eighty-seven percent of firms nationwide with paid employees were corporations. (*Id.*) Based on the assumption that *none* of the firms without paid employees was a corporation, Professor Harrington determined *at least* fifty-one percent of funeral homes nationwide were incorporated. (*Id.*) Fifty-one percent is therefore not a prediction but instead represents the lowest possible percentage of incorporated funeral homes.

Process and Equal Protection Clauses of the Fourteenth Amendment in light of the exempt corporations under section 7-309(b). Plaintiff Chisholm, a Florida resident, is the only Plaintiff with residency outside of Maryland. He challenges section 7-309(a) under the dormant Commerce Clause. On March 1, 2006, Plaintiffs filed suit against the members of the State Board of Morticians in their official capacities.

On October 11, 2006, this Court granted Defendants' Motion to Dismiss Count Four of the Complaint, which alleged that the Morticians Act violated the Privileges and Immunities Clause of the Fourteenth Amendment by imposing arbitrary and unreasonable restrictions on the ownership of funeral homes. (Paper No. 19.) This Court denied the remainder of Defendants' Motion to Dismiss, thereby allowing Plaintiffs to proceed with discovery with respect to the remainder of their claims. Specifically, Plaintiffs seek a declaratory judgment pursuant to 28 U.S.C. § 2201 that section 7-310 of the Morticians Act violates the Due Process and Equal Protection Clauses because it permits funeral home ownership only by "licensed individuals." Plaintiffs also seek a declaratory judgment that the corporate prohibition of section 7-309(a) of the Morticians Act violates both the Due Process and Equal Protection Clauses of the Fourteenth Amendment and the dormant Commerce Clause. On April 24, 2007, the parties filed cross motions for summary judgment. On September 10, 2007, the Court conducted a hearing on both motions.

STANDARD OF REVIEW

Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Celotex Corp. v. Catrett,* 477 U.S. 317, 323-24 (1986). When cross motions for summary judgment demonstrate a basic agreement concerning what legal theories and material facts are dispositive, they "may be probative of the nonexistence of a factual dispute." *Shook v. United States,* 713 F.2d 662, 665 (11th Cir. 1983). At the hearing conducted on September 10, 2007, the parties agreed that there is no dispute as to any material fact and that this Court may render judgment as a matter of law.

DISCUSSION

I. Section 7-310: The Licensing Requirement

Plaintiffs have advanced their challenge on the licensing requirement to the Morticians Act under both the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The substantive aspect of the Due Process Clause embodies a liberty interest that protects, subject to reasonable government regulation, the right to pursue a chosen occupation. *E.g. Conn. v. Gabbert,* 526 U.S. 286, 291-92 (1999);

Meyer v. Nebraska, 262 U.S. 390, 399-400 (1923). The Equal Protection Clause likewise provides for protection against government regulations that do not treat similarly situated individuals alike. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439-40 (1985).

In addressing due process and equal protection challenges to state statutes, the United States Court of Appeals for the Fourth Circuit has explained that there is "a strong presumption of validity so long as [the state statute does] not discriminate against any protected class or burden any fundamental right." *Helton v. Hunt*, 330 F.3d 242, 246 (4th Cir. 2003) (citing *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313-14 (1993)). As the Fourth Circuit noted, the Supreme Court in *Vacco v. Quill*, 521 U.S. 793, 799 (1997), held that a state statute need only bear a "rational relation to some legitimate end." Both parties agree that the issues raised by Plaintiffs with respect to the licensing requirement set forth in section 7-310 do not implicate any fundamental right or suspect classification.

In addressing a constitutional challenge to the Oklahoma Funeral Services Licensing Act by casket sellers seeking to sell caskets in Oklahoma, the United States Court of Appeals for the Tenth Circuit in *Powers v. Harris*, 379 F.3d 1208 (10th Cir. 2004),

summarized the standard for analysis.[12] The court stated that a "state economic regulation that does not affect a fundamental right and categorizes people on the basis of a non-suspect classification" will pass "constitutional muster, both as a matter of substantive due process and equal protection, by applying rational-basis review." *Id.* at 1215 (citing *Fitzgerald v. Racing Assoc. of Cent. Iowa*, 539 U.S. 103, 107 (2003) (equal protection); *General Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992) (substantive due process)). Accordingly, the constitutional challenge to the licensing requirement of the Morticians Act is subject only to rational basis review. Although the interests protected by the Due Process and Equal Protection Clauses are distinct-substantive due process protects fundamental rights and liberty interests from arbitrary government action, while equal protection provides for equal treatment between individuals or groups of individuals – they are analyzed together. *See Guardian Plans Inc. v. Teague*,

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[12] In *Powers*, the Tenth Circuit affirmed a district court judgment following a bench trial that found that the state statute in question did not violate substantive due process or equal protection. The Tenth Circuit noted the contrary opinion of the United States Court of Appeals for the Sixth Circuit in *Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002), in which the court affirmed a district court judgment following a bench trial that found that the licensing requirements for retail funeral merchandise stores were not rationally related to the purpose of the statute and thus violated substantive due process and equal protection. The rational basis test was recognized as the standard for analysis in both cases.

870 F.2d 123, 125 n.2 (4th Cir. 1989) ("For analytical purposes, we will treat appellants' due process and equal protection challenges as one. We do this because, when reviewing economic regulations, the legal standard – rationally related to a legitimate state interest – is the same." (internal citation omitted)).

Rational basis review is the most deferential and least exacting standard to review constitutional claims:

> [T]he Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality.

McGowan v. Maryland, 366 U.S. 420, 425-26 (1979). The Morticians Act expressly states that its purpose "is to protect the health and welfare of the public." Md. Code Ann., Health Occ. § 7-103. Although there is no legislative history to elaborate on this stated purpose, there is no doubt that the protection of the health and safety of the citizens of Maryland is a legitimate purpose. *E.g. Schenck v. Pro-Choice Network of Western N.Y.*, 519 U.S. 357, 375-76 (1997); *Hodel v. Virginia Surface Mining & Reclamation*

Ass'n, 452 U.S. 264, 300 (1981). Under rational basis review, this Court may not inquire into the sincerity of the articulated purpose because it must be "assume[d] that the objectives articulated by the legislature are actual purposes of the statute, unless an examination of the circumstances forces us to conclude that they could not have been a goal of the legislation." *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 463 n.7 (1981) (internal quotations omitted).

Moreover, this Court must consider whether the licensing requirement of the Morticians Act, as set forth in section 7-310, furthers any legitimate purpose, even if the legitimate purpose is unrelated to the actual purpose behind the statute. As an economic regulation, the Morticians Act must be upheld "if there [are] any reasonably conceivable state of facts that could provide a rational basis for the classification." *Beach Communications*, 508 U.S. at 313. The burden under rational basis review falls squarely on Plaintiffs "to negative every conceivable basis which might support it. Moreover, . . . it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." *Id.* at 315 (internal citations omitted).

Plaintiffs contend that the licensing requirement of the Morticians Act does not meet this minimal standard because there is no justification for prohibiting non-morticians from owning funeral homes. Plaintiffs' argument is couched almost exclusively in

terms of the surviving spouse and executor licenses, which, according to Plaintiffs, demonstrate the arbitrariness of the licensing requirement. The Morticians Act, however, requires that funeral homes owned by a surviving spouse or executer licensee employ a supervising mortician on the premises. *See* Md. Code Ann., Health Occ. §§ 7-308(e)(1); 7-308.1(e)(1).

In a factually similar case, *Guardian Plans, Inc. v. Teague,* 870 F.2d 123, 125-26 (4th Cir. 1989), the Fourth Circuit upheld a Virginia statute that was challenged on due process and equal protection grounds by a company that sold funeral goods and services through an insurance-funded prearranged funeral program. The basis for the lawsuit was that the plaintiffs believed that it was "ludicrous to require a salesperson, who does nothing more than make preneed arrangements, to have the same credentials as a full-fledged funeral director." *Id.* at 126. Noting that it has long been recognized that the state may protect the health, safety and welfare of its citizens through the regulation of the funeral profession, the Fourth Circuit found that the "Virginia General Assembly could have rationally determined that keeping the arrangement of funerals in the hands of licensed funeral professionals would benefit the public by ensuring competence in funeral arrangement." *Id.*

In this case, the Maryland General Assembly could have rationally determined that the public's health, safety and welfare are furthered by requiring

that a licensed mortician own the funeral home where mortuary science is practiced. The exceptions to the licensing requirement of the Morticians Act are an insufficient basis for this Court to strike down wholesale the regulatory scheme established by section 7-310. The surviving spouse and executor licenses provide needed protection for the financial interests of a deceased mortician's family as business affairs are handled in her or his absence. The executor license may not be "renewed or reinstated" after six months, at which point the personal representative must "qualify and be licensed as a mortician." These licenses do not come at the expense of public health, safety, or welfare, as the surviving spouse or executor is required to hire a supervising mortician. *See* Md. Code Ann., Health Occ. §§ 7-308(e)(1); 7-308.1(e)(1).

Protecting the health, safety and welfare of the public is undoubtedly a legitimate state interest, and this Court finds that the licensing scheme of section 7-310 of the Morticians Act rationally furthers that interest. The wisdom of the Maryland General Assembly with respect to the licensing requirement and limited exceptions for a surviving spouse and executor will not be questioned by this Court under a substantive due process or equal protection challenge as the licensing scheme is rationally related to the achievement of a legitimate state interest and objective. *See McGowan*, 366 U.S. at 425.

II. Sections 7-309(a) and 7-309(b): The Corporate Prohibition

Plaintiffs have challenged the general corporate prohibition of section 7-309(a), as well as the exemptions created by section 7-309(b), under not only the Due Process and Equal Protection Clauses of the Fourteenth Amendment, but also the dormant Commerce Clause. In 1963, the Court of Appeals of Maryland addressed due process and equal protection challenges to the ban on corporate ownership of funeral homes in *Brooks v. State Board of Funeral Directors and Embalmers,* 195 A.2d 728 (1963). In *Brooks*, the Morticians Act was not challenged under the dormant Commerce Clause. Plaintiffs' constitutional challenges in this action invite further rational basis review under the Due Process and Equal Protection Clauses, but Maryland's unique ban on corporate ownership of funeral homes, with fifty-eight exempt corporate licenses, compels this Court to decide the case under the dormant Commerce Clause.

A. Due Process and Equal Protection Clauses of the Fourteenth Amendment

Because neither the corporate prohibition of section 7-309(a) nor the fifty-eight corporate exemptions under section 7-309(b) implicate a fundamental right or suspect classification, Plaintiffs' challenge is subject to the same rational basis review discussed at length above. In *North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 166-67 (1973), the Supreme Court upheld a state statute that

required that licensed pharmacists own the majority of shares in a corporation seeking to be licensed to practice pharmacy. The Supreme Court explained as follows:

> 'A standing criticism of the use of corporations in business is that it causes such business to be owned by people who do not know anything about it. . . . The selling of drugs and poisons calls for knowledge in a high degree, and Pennsylvania after enacting a series of other safeguards has provided that in that matter the divorce shall not be allowed. . . . The Constitution does not make it a condition of preventive legislation that it should work a perfect cure. It is enough if the questioned act has a manifest tendency to cure or at least to make the evil less.'

Id. (quoting *Liggett Co. v. Baldridge,* 278 U.S. 105, 114-15 (1928) (Holmes, J., dissenting)). The quoted passage supports the notion that ownership of corporations may be limited in highly skilled occupations where licensing is required, such as mortuary science. The Maryland General Assembly certainly has a rational basis to require the presence of licensed individuals in the ownership structure of a corporation practicing mortuary science. For example, Pennsylvania has enacted a statute very similar to the statute approved by the Supreme Court in *Snyder's Drug Stores, Inc.,* whereby all the shareholders of a corporate funeral home must be "licensed funeral directors or the members of the immediate family of a licensed funeral director." 63 Pa. Stat.

Ann. § 479.8. The Morticians Act, however, only permits fifty-eight exempt corporations to practice mortuary science, any of which may be owned entirely by unlicensed individuals.

Nonetheless, Defendants contend that the fifty-eight exempt corporations under section 7-309(b) "preserve the reliance interests of corporations that held licenses as of June 1, 1945." Defs.' Mem. Supp. Summ. J. at 23. They rely principally on *Brooks*, where the Court of Appeals of Maryland held that the original owners' reliance interests were sufficient to sustain the corporate prohibition because the classification had the "purpose of preserving existing investments or values." *Brooks*, 195 A.2d at 737. While there may have been a rational basis in preserving economic investments in 1963, it is now questionable whether the legitimate state interest in preserving economic investments of original owners is rationally furthered by the current statutory scheme.[13]

As this Court discussed in its memorandum opinion on Defendants' Motion to Dismiss (Paper No. 19), the exempt corporate licenses under section

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[13] In 1963, seventy-six percent of the corporate licenses remained in the control of the pre-1945 owners. By 2006, over ninety-five percent of the corporate licenses had been sold at least once. There are only three corporate licenses still held within the same family as in 1945. Pls.' Mem. Supp. Summ. J. at 8. Thus, there appears to be a diminished rational basis for sustaining the existing statutory structure based on the reliance interests of corporations that held licenses as of June 1, 1945, when the current exemptions were enacted.

7-309(b) are permanent. Permanent exemptions raise serious equal protection concerns by creating an indefinite classification system that benefits some to the exclusion of all others. *See Delaware River Basin Com'n v. Bucks County, Etc.*, 641 F.2d 1087, 1098-99 (3d Cir. 1981). This Court has difficulty finding how a defined class of permanent corporate exemptions in a skilled occupation, such as mortuary science, rationally furthers the public's health and safety. The licenses are also freely transferable as long as the holder continues to renew it. In this regard, section 7-309(b) of the Morticians Act is distinguishable from the provisions at issue in *City of New Orleans v. Dukes,* 427 U.S. 297, 303-04 (1976), where the Supreme Court upheld a New Orleans ordinance that generally prohibited pushcart vendors from operating in the French Quarter, but which exempted pushcart vendors who had operated in the Quarter for at least eight years in a grandfather provision. The exempt pushcart licenses were personal to the existing vendors and consequently limited in duration. Section 7-309(b) of the Morticians Act is likewise distinguishable from the provisions at issue in *Helton v. Hunt,* 330 F.3d 242, 246-47 (4th Cir. 2003), where the Fourth Circuit held that North Carolina could constitutionally ban the operation of video poker machines brought into the state after June 30, 2000, but not video poker machines brought into the state before that date. As in *Dukes,* the exemption in *Helton* was not permanent because it applied to individual poker machines, which presumably break down over time.

This Court recognizes the full faith and credit extended to decisions of the Court of Appeals of Maryland. As set forth in 28 U.S.C. § 1738, the statutory analogue to the Full Faith and Credit Clause in the United States Constitution,[14] "[t]he . . . judicial proceedings of any court of any such State . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State." Mindful of this deference to the Court of Appeals' 1963 decision in *Brooks,* this Court need not invalidate sections 7-309(a) and 7-309(b) on the questionable grounds that they still rationally further a legitimate interest under the Due Process and Equal Protection Clauses. The Maryland ban on corporate ownership on funeral homes, along with the fifty-eight exempt corporate licenses, cannot survive dormant Commerce Clause analysis.

B. Dormant Commerce Clause

The Commerce Clause provides that "Congress shall have Power . . . [to] regulate Commerce . . . among the several states."[15] In addition to this express authorization to Congress, the Commerce Clause has also been interpreted for over 150 years as implicitly embodying a self-excluding limitation on the power of the states to substantially burden

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[14] U.S. Const. art. IV, § 1.

[15] U.S. Const. art. I, § 8, cl. 3.

interstate commerce, a restriction known as the "dormant Commerce Clause." *See Cooley v. Bd. of Wardens,* 53 U.S. (12 How.) 299, 317-20 (1852). The dormant Commerce Clause "limits the power of the States to erect barriers against interstate trade." *Dennis v. Higgins,* 498 U.S. 439, 446 (1991). The Framers of our Constitution not only intended that "every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation," but also that "every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any." *H.P. Hood & Sons, Inc. v. Du Mond,* 336 U.S. 525, 539 (1949). Thus, the primary objective of the dormant Commerce Clause is to "preserve a national market for competition undisturbed by preferential advantages conferred by a State upon its residents or resident competitors." *General Motors Corp. v. Tracy,* 519 U.S. 278, 299 (1997). The Supreme Court has cautioned, however, that "[i]n the absence of conflicting federal legislation, the States retain authority under their general police powers to regulate matters of legitimate local concern, even though interstate commerce may be affected." *Lewis v. BT Inv. Mgrs. Inc.,* 447 U.S. 27, 36 (1980) (internal quotations omitted).

In *Yamaha Motor Corp. v. Jim's Motorcycle Inc.,* 401 F.3d 560, 567 (4th Cir. 2005), the Fourth Circuit explained that "[a]nalysis of a dormant Commerce Clause challenge to a state statute proceeds on two tiers, a discrimination tier and an undue burden tier."

A state law that discriminates against interstate commerce facially, in its practical effect or in its purpose is properly reviewed under the first analytical tier. *Wyoming v. Oklahoma,* 502 U.S. 437, 454-55 (1992); *see also Envtl. Tech. Council v. Sierra Club,* 98 F.3d 774, 785 (4th Cir. 1996). A discriminatory state law is subject to a *per se* rule of invalidity and will be struck down unless the state establishes "both that the statute serves a legitimate local purpose, and that this purpose could not be served as well by available nondiscriminatory means." *Maine v. Taylor,* 477 U.S. 131, 138 (1986) (internal quotations omitted). Mere economic protectionism alone is never sufficient to sustain a challenged state law under the dormant Commerce Clause. *Wyoming,* 502 U.S. at 454-55. The second analytical tier, known as the *Pike* balancing tier, applies to a state law if it "regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental." *Pike v. Bruce Church, Inc.,* 397 U.S. 137, 142 (1970). Under the *Pike* balancing tier, the state law will withstand constitutional scrutiny unless the burdens on commerce are "clearly excessive in relation to the putative local benefits." *Id.*

Plaintiffs' dormant Commerce Clause challenge relates only to sections 7-309(a) and 7-309(b), the provisions that prevent further corporate ownership of funeral homes beyond the fifty-eight available corporate licenses in existence since 1945. Plaintiffs correctly concede that these provisions do not facially discriminate against interstate commerce. Instead,

Plaintiffs assert that the two sections of the Morticians Act discriminate in practical effect against interstate commerce and therefore should be struck down under the first tier.[16] Alternatively, they argue that even if the two sections of the Morticians Act do not discriminate against interstate commerce in practical effect, they nonetheless fail the *Pike* balancing test. These arguments will be addressed in turn.

1. Discriminatory Effect of the Morticians Act

A state law is deemed to have a discriminatory effect if it provides for "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste*

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[16] Plaintiffs mention that the Morticians Act is "arguably discriminatory in purpose." Pls.' Mem. Supp. Summ. J. at 16. In determining whether a given piece of legislation has a discriminatory purpose, "[t]here is, of course, no more persuasive evidence . . . than the words by which the legislature undertook to give expression to its wishes." *Perry v. Commerce Loan Co.*, 383 U.S. 392, 400 (1966). As discussed earlier, the stated purpose of the Morticians Act is to "protect the health and welfare of the public." Md. Code Ann., Health Occ. § 7-103. Both parties readily acknowledge that there is a dearth of direct legislative history and therefore an absence of any readily discernible source that contradicts the Maryland General Assembly's self-serving statement of legislative intent. *Cf. Chambers Med. Techs. of S.C., Inc. v. Bryant*, 52 F.3d 1252, 1259 n.10 (4th Cir. 1995). In short, there is simply no evidence of discriminatory purpose.

Sys., Inc. v. Dep't of Envtl. Quality, 511 U.S. 93, 99 (1994). Plaintiffs contend that the Morticians Act "plainly discriminates in practical effect" against interstate commerce because it "permits [fifty-eight] favored domestic corporations to own funeral homes, but *categorically forbids* out-of-state corporations from doing so." Pls.' Mem. Supp. Summ. J. at 26 (emphasis added). In 1945, the Maryland General Assembly effectively prevented all additional corporations from entering the market except for the Maryland corporations already in existence. As accurate as Plaintiffs' assertion may have been in 1945 when the provision at issue was enacted, it is plainly no longer the case according to Plaintiffs' own submissions: "At present, licensed morticians own about half of the [fifty-eight] 'grandfather' corporations, while the national chains . . . own the other half."[17] Pls.' Mem. Supp. Summ. J. at 6-7.

There is no question that the Morticians Act, and especially the provision restricting corporate ownership, is at minimum a protectionist piece of legislation. The Morticians Act does not, however, "negatively impact interstate commerce to a greater degree than intrastate commerce." *Waste Mgmt. Holdings, Inc. v. Gilmore*, 252 F.3d 316, 335 (4th Cir. 2001). Plaintiffs' comparison to *West Lynn Creamery v. Healy*, 512 U.S. 186 (1994), is therefore misguided.

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[17] Counsel for the parties acknowledged at the hearing on September 10, 2007 that the national chains were required to purchase existing corporate licenses.

In *West Lynn*, the Supreme Court struck down a Massachusetts pricing order that taxed all milk sold in the state and distributed the tax revenue exclusively to in-state milk producers. *Id.* at 194-96. Although facially nondiscriminatory, the effect of the pricing order was clearly discriminatory because the exclusive tax revenue distribution to in-state producers placed the tax burden solely on out-of-state producers. The practical effect of section 7-309(a) of the Morticians Act, however, is to prevent all corporations without an exempt corporate license from owning a funeral home, regardless of whether the corporation is a Maryland one or not. The Morticians Act regulates evenhandedly by treating in-state and out-of-state interests the same.

Plaintiffs nevertheless rely on *C & A Carbone v. Town of Clarkstown*, 511 U.S. 383 (1994), to support their argument. In *Carbone*, the Supreme Court invalidated under the dormant Commerce Clause a local flow control ordinance that required all waste entering the town be delivered to a particular processing facility. *Id.* at 394-95. The ordinance in *Carbone* was found to be discriminatory even though it covered in-state processors. *Id.* at 389. The Supreme Court, however, made it clear that "[i]n this light, the flow control ordinance is just one more instance of local processing requirements that we long have held invalid." *Id.* The import of *Carbone* should not be extended beyond the line of cases in which the Supreme Court deliberately placed it.

2. Undue Burden of the Morticians Act

The framework to review the corporate prohibition of the Maryland Morticians Act was delineated in *Pike v. Bruce Church,* 397 U.S. at 142. Under the *Pike* test, a statute that regulates evenhandedly may nonetheless violate the dormant Commerce Clause if the "burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Id.* at 142, 90 S.Ct. 844. The *Pike* test represents a "less strict scrutiny," *Wyoming,* 502 U.S. at 455 n. 12, whereby "the extent of the burden that will be tolerated . . . depends on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." *Pike,* 397 U.S. at 142. Under the *Pike* test, this Court is required to analyze the putative benefits of the Morticians Act to determine whether the Maryland General Assembly had a "rational basis for believing there was a legitimate purpose that would be advanced by the statute." *Yamaha,* 401 F.3d at 569. This Court is reminded by Defendants that "[i]n determining whether a statute has 'a legitimate local purpose' and 'putative local benefits,' a court must proceed with deference to the state legislature." *Id.* While deference to the state legislature is unquestionably required, the Fourth Circuit has been more exacting than Defendants have suggested in their submissions.

For example, the Virginia statute at issue in *Yamaha,* like the Maryland Morticians Act, intended

to limit new competition. The statute permitted any existing motorcycle dealer in Virginia to protest the establishment of a new dealership selling the same brand anywhere within the state. *Id.* at 563. Defendants argued that it prevented "market saturation," but the Fourth Circuit reviewed the evidence presented by the parties and found that it was a "serious question" whether the "weak" benefit adduced by the state was legitimate. *Id.* at 571. The court ultimately concluded that there was an "absence of evidence that protection in the form of statewide protest rights for every motorcycle dealer was needed." *Id.* at 573.

Similarly, in *Medigen, Inc. v. Pub. Serv. Comm'n*, 985 F.2d 164, 167 (4th Cir. 1993), the Fourth Circuit affirmatively questioned and ultimately rejected the state's purported benefit, which was "reasonable prices," by examining the record before it. The court explained that "where competition has destructive effects, regulation may be justified. . . . We find *no basis in the record*, however, for concluding that competition in this market has had or will have any destructive effects. Because the 'ruinous' effects of competition are entirely speculative, their prevention cannot justify restricting market entry." *Id.* (emphasis added).

In this case, Defendants argue that the legitimate purpose furthered by the corporate prohibition is consumer protection. *See* Defs.' Mem. Supp. Summ. J. at 32 ("The Maryland General Assembly made the rational determination that the citizens of Maryland would be afforded greater protection if corporations

were no longer issued licenses."); Defs.' Resp. at 15 ("The Maryland Morticians Act is an exercise of the state's police power in an effort to regulate morticians and protect the citizens of Maryland."). Defendants offer the deposition of Defendant Hovatter, the President of the State Board of Morticians, who testified that corporations are not accountable or responsive. Plaintiffs have countered with evidence that Defendant Hovatter never actually studied the matter, nor did anybody else on the State Board of Morticians. Pls.' Mem. Supp. Summ. J. at 10-11. Plaintiffs also point to the preceding President, Greg Harthausen, who testified that corporate-owned funeral homes were often more responsive than individually-owned funeral homes to concerns and requests from the State Board. (Pl. Ex. 9, Harthausen Decl. ¶ 4.) The selective statements by other members of the State Board of Morticians are also unsupported by any objective criteria. In fact, Harthausen testified that during his tenure the State Board of Morticians did not have "any evidence that non-mortician ownership of funeral homes would hurt consumers in any way." (Harthausen Decl. ¶ 4.) Moreover, despite Defendants' claims that funeral homes owned by corporations pose discrete consumer protection concerns, they never acted on these concerns by subjecting the fifty-eight licensed corporations to any additional oversight, nor have they required corporations to disclose their status to potential customers. *Id.* Considering the undisputed facts in this case, this Court must conclude that the Defendants' claims of consumer protection concerns appear to be no more

than "entirely speculative." *Medigen*, 985 F.2d at 167. Instead, Maryland consumers have been negatively affected by the lack of competition resulting from the corporate prohibition. This negative impact is reflected by the inflated cost of funerals in Maryland which well exceed the national average.

Turning to the burden side of the *Pike* ledger, "a closer examination" is required. *Yamaha*, 401 F.3d at 569. In Maryland, publicly held corporations and national chains own thirty of the fifty-eight corporate licenses, but twenty-eight are owned by privately held Maryland corporations. Defs.' Mem. Supp. Summ. J. at 12. Despite these balanced figures, the burden on interstate commerce is still significant in that any person wishing to own a corporate funeral home in Maryland must wait until one of the fifty-eight corporate licenses is for sale. Once one is placed on the market, the price for the license is inflated. The market premium placed on a corporate license is not only demonstrated through testimonial evidence, but also through data submitted by the Department of Legislative Services of the Maryland General Assembly.

The *Yamaha* Court found that there was a "chilling effect" on the ability of motorcycle dealerships to expand into Virginia. *Yamaha*, 401 F.3d at 571. Plaintiffs have also established that there is a "chilling effect" on corporate expansion of funeral homes into Maryland, as evidenced by data demonstrating that the percentage of corporate funeral homes in Maryland is at least thirty percent

lower than the national average. In *Yamaha,* the motorcycle dealers were forced to "forego [all efforts to] establish new dealers in Virginia," instead "devot[ing] their capital and business expansion efforts in other states." *Yamaha,* 401 F.3d at 572. Similarly, Plaintiff Chisholm has been prevented from opening a corporate funeral home in the local market because of the prohibition. It is quite clear to this Court that the undisputed facts in this case compel the conclusion that the Morticians Act has had a "chilling effect" on the ability of out-of-state corporations to enter the Maryland market.

Not only is the law clearly anti-competitive, but it is also unique. In *Yamaha,* the Fourth Circuit emphasized that the provision at issue was "uniquely anti-competitive" and that it had "no parallel in the law of any other state." *Yamaha,* 401 F.3d at 571. Maryland is joined only by New Hampshire in prohibiting corporate ownership. Moreover, Professor Harrington, an expert in the economics of the funeral industry, testified that in his opinion the corporate prohibition on funeral homes is the "most blatantly anti-competitive state funeral regulation in the nation." (Harrington Decl. ¶ 35.) The reduction in competition also explains the comparatively excessive cost of a Maryland funeral, which was estimated to be almost $800 more than the national average. (*Id.* ¶¶ 20-30.)

In *Yamaha,* the Fourth Circuit found that when there are "few or no adversely affected in-state interests, *Pike* balancing serves as a check against

legislative abuse." *Yamaha,* 401 F.3d at 569. The Fourth Circuit also discussed the implications where "in-state interests actively seek to protect the burdensome law," *id.* at 573, and found that

> [a]lthough those brave enough to try to open new dealerships are likely to be Virginia residents, these few individuals are sure to be outnumbered and out-gunned by the existing dealers. As a result, there is little political check against the possibility of legislative abuse in the form of motorcycle franchise laws that unduly burden commerce.

Id. at 569. In this case, the in-state interests that have worked to lift ownership restrictions have undoubtedly been "outnumbered and out-gunned," especially considering that the Task Force to Examine the State's Cemetery and Funeral Industry concluded over a decade ago that "Maryland law [should] be changed to allow the issuance of additional corporate licenses for the ownership and operation of funeral homes." Final Report of the Task Force, at 22-23. The Maryland funeral home industry has benefitted from the "most blatantly anti-competitive state funeral regulation in the nation," (Harrington Decl. ¶ 35.), and therefore "'has been mollified' by the economic protection [it] currently enjoy[s]." *Yamaha,* 401 F.3d at 573 (quoting *Clover Leaf,* 449 U.S. at 473 n. 17). Therefore, just as in *Yamaha,* "there is little political check against the

possibility of legislative abuse . . . that unduly burden[s] commerce." *Id.*

This Court has little difficulty in finding that sections 7-309(a) and 7-309(b) of the Morticians Act, which prohibit corporate ownership of funeral homes in Maryland with indefinite exemptions for corporations holding licenses existing as of June 1, 1945, cannot withstand analysis under the *Pike* test and therefore violates the dormant Commerce Clause. The burdens of these provisions are considerable. The corporate prohibition severely limits the ability of out-of-state businesses from opening a funeral home in Maryland. Even if one of the fifty-eight licenses does become available, a prospective out-of-state purchaser must pay an inflated price for the license. The undisputed record in this case indicates that these burdens are intolerable and clearly excessive in relation to any benefits proffered by the Defendants. Consumer protection is obviously a legitimate interest, but Defendants have offered almost no evidence demonstrating that corporate funeral homes pose a discrete risk to the public, and that the corporate prohibition in any way furthers consumer protection. On the contrary, it is quite clear to this Court that Maryland consumers have been harmed by the corporate prohibition of the Morticians Act by being forced to pay funeral prices well in excess of the national average.

CONCLUSION

For the reasons stated above, the cross motions for summary judgment by the parties are each GRANTED IN PART and DENIED IN PART.

Plaintiffs' Motion for Summary Judgment seeking declaratory and permanent injunctive relief is GRANTED as to sections 7-309(a) and 7-309(b) of the Maryland Morticians Act, which this Court finds violate the dormant Commerce Clause. Defendants' Motion for Summary Judgment is DENIED on this ground.

Defendants' Motion for Summary Judgment is GRANTED as to section 7-310 of the Maryland Morticians Act because this Court finds that the licensing scheme is rationally related to a legitimate state interest and does not violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Plaintiffs' Motion for Summary Judgment is DENIED on this ground.

A separate Order and Judgment follows.

/s/

Richard D. Bennett
United States District Judge

Date: October 17, 2007

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CHARLES BROWN, *et al.*,	*	Civil Action No.: RDB-06-524
Plaintiffs,	*	
v.	*	
DAVID HOVATTER, *et al.*,	*	
Defendants.	*	

* *

ORDER AND JUDGMENT

(Filed Oct. 17, 2007)

For the reasons stated in the foregoing Memorandum Opinion, IT IS HEREBY ORDERED AND ADJUDGED this 17th day of October 2007 that:

1. Plaintiffs' Motion for Summary Judgment (Paper No. 28) is GRANTED IN PART and DENIED IN PART;

2. Defendants' Motion for Summary Judgment (Paper No. 29) is GRANTED IN PART and DENIED IN PART;

3. Sections 7-309(a) and 7-309(b) of the Maryland Morticians Act, Md. Code Ann., Health Occ. §§ 7-101-602, which prohibit corporate ownership of funeral homes in Maryland with indefinite exemptions for corporations holding licenses existing as June 1, 1945, violate

the dormant Commerce Clause of the United States Constitution. The Defendants and their successors are hereby ENJOINED from enforcing these two statutory provisions and are hereby ENJOINED from prohibiting and limiting the corporate ownership of funeral homes in Maryland;

4. Section 7-310 of the Maryland Morticians Act, Md. Code Ann., Health Occ. §§ 7-101-602, which establishes a licensing scheme for the operation of funeral homes in Maryland, is rationally related to a legitimate state interest and does not violate the Fourteenth Amendment of the United States Constitution;

5. The Clerk of the Court transmit copies of this Order and Judgment and accompanying Memorandum Opinion to counsel for the parties; and

6. The Clerk of the Court CLOSE this case.

/s/
Richard D. Bennett
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CHARLES BROWN, *et al.*, Plaintiffs,	*	
v.	*	Civil Action No.: RDB-06-524
DAVID HOVATTER, *et al.*, Defendants.	*	

* *

MEMORANDUM OPINION

(Filed Dec. 11, 2007)

Pending before this Court is a Motion for Amendment of Judgment filed by Plaintiffs Charles Brown, Brian Chisolm, Joseph B. Jenkins, III, and Gail Manuel (collectively "Plaintiffs") regarding this Court's prior Order and Judgment (Paper No. 42) and accompanying Memorandum Opinion (Paper No. 41) on the parties' cross motions for summary judgment. The issue presented by the pending motion has been fully briefed and no hearing is necessary. *See* Local Rule 105.6 (D. Md. 2004). For the reasons stated below, Plaintiffs' Motion for Amendment of Judgment (Paper No. 43) under Rule 59(e) of the Federal Rules of Civil Procedure is DENIED, as a substantive change to the previous judgment is not required.

Instead, this Court will clarify the scope of its holding because Plaintiffs have argued that it is susceptible to two possible interpretations.

BACKGROUND

The complete factual and procedural background of this case has been fully set forth in this Court's Memorandum Opinion on the parties' cross motions for summary judgment and a lengthy discussion herein is not necessary.

Plaintiffs filed a lawsuit in this Court seeking declaratory and injunctive relief against David Hovatter, in his official capacity as President of the Maryland State Board of Morticians, and Faye Peterson, Michael Ruck, Sr., Gladys Sewell, Donald V. Borgwardt, Marshall Jones, Jr., Michael Kruger, Brian Haight, Robert Bradshaw, Jeffery Pope, and Vernon Strayhorn, Sr., in their official capacities as members of the Maryland State Board of Morticians (collectively "Defendants"). Plaintiffs sought to have several provisions of the Maryland Morticians Act, Md. Code Ann., Health Occ. §§ 7-101-602 (the "Act" or the "Morticians Act"), declared unconstitutional. On April 24, 2007, the parties filed cross motions for summary judgment. (Paper Nos. 28, 29.) On September 10, 2007, this Court conducted a hearing on both motions and, on October 17, 2007, this Court released the Order and Judgment (Paper No. 42) and accompanying Memorandum Opinion (Paper No. 41).

In their Motion for Summary Judgment, Plaintiffs first challenged the licensing requirement of the Morticians Act, which provides that every application for a funeral home in Maryland be signed by a "licensed individual" who is also "the owner or co-owner of the establishment to be licensed." Md. Code Ann., Health Occ. § 7-310(b). Specifically, Plaintiffs challenged the licensing requirement under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution.[1] This Court held that "section 7-310 of the Morticians Act, which establishes a licensing scheme for the operation of funeral homes in Maryland, is rationally related to a legitimate state interest and does not violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment." (Mem. Op. 2-3.) Additionally, this Court held that the licensing provision may be imposed on both corporate and non-corporate owners of funeral homes. (*Id.* at 3.)

Next, Plaintiffs challenged the corporate prohibition of the Morticians Act, under which a corporation may not own a funeral home unless it was licensed to do so prior to June 1, 1945. Md. Code Ann., Health Occ. §§ 7-309(a), 7-309(b). Plaintiffs challenged the corporate prohibition, along with the statutory exceptions, under the Due Process and

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[1] Count One of the Complaint, titled "Equal Protection-Licensure," and Count Three, titled "Due Process," form the basis of the Plaintiffs' challenge to the licensing requirement.

Equal Protection Clauses of the Fourteenth Amendment and the dormant Commerce Clause.[2] This Court addressed the Fourteenth Amendment challenge to the corporate prohibition, but did not make any conclusion of law on the matter. (Mem. Op. 18-21.) Instead, this Court held that the corporate prohibition embodied in sections 7-309(a) and 7-309(b) violated the dormant Commerce Clause and enjoined the Defendants from limiting the corporate ownership of funeral homes in Maryland to only those holding an exempt corporate license. (*Id.* at 2.)

On October 31, 2007, Plaintiffs filed a Motion for Amendment of Judgment because of a perceived ambiguity in the Memorandum Opinion. (Paper No. 43.) Within the Motion, Plaintiffs also requested that this Court clarify its holding. On November 19, 2007, Defendants filed a Response (Paper No. 44) and, on November 27, 2007, Plaintiffs filed a Reply (Paper No. 45).

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[2] Count Two of the Complaint, titled "Equal Protection-Corporate Ownership," comprises the Fourteenth Amendment challenge. This Court interpreted Plaintiffs' argument under Count Two to also incorporate the Due Process Clause because cases relied upon by both parties were interchangeably based on both the Equal Protection and Due Process Clauses, and because the standard – rational basis – used to analyze both claims is the same. Count Five, titled "Commerce Clause," forms the basis for the dormant Commerce Clause challenge. There is no corresponding dormant Commerce Clause challenge to the individual licensing requirement in the Complaint, nor was the issue briefed in the parties' submissions or addressed at the hearing.

STANDARD OF REVIEW

Rule 59(e) of the Federal Rules of Civil Procedure provides simply that "[a] motion to alter or amend a judgment must be filed no later than 10 days after the entry of the judgment." Fed. R. Civ. P. 59(e). The United States Court of Appeals for the Fourth Circuit has repeatedly recognized that a judgment may be amended in only three circumstances: "(1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice." *Pacific Ins. Co. v. Am. Nat'l Fire Ins. Co.*, 148 F.3d 396, 403 (4th Cir. 1998) (citing *EEOC v. Lockheed Martin Corp., Aero & Naval Sys.*, 116 F.3d 110, 112 (4th Cir. 1997); *Hutchinson v. Staton*, 994 F.2d 1076, 1081 (4th Cir. 1993)). Rule 59(e) does not permit a party to "raise arguments which could have been raised prior to the issuance of the judgment," nor does it enable a party to "argue a case under a novel legal theory that the party had the ability to address in the first instance." *Pacific Ins. Co.*, 148 F.3d at 403.

It is, however, permissible for a district court to clarify a previous judgment under the auspice of Rule 59(e) without necessarily amending it, so long as it is filed within ten days of judgment. *See Capacchione v. Charlotte-Mecklenburg Sch.*, 190 F.R.D. 170, 175 (W.D.N.C. 1995) ("A post-judgment motion for clarification requesting a court to interpret the scope of its injunction is properly made under Rule 59(e)[.]"); *Belair v. Lombardi*, 151 F.R.D. 698, 699 (M.D. Fla.

1993) ("A motion to clarify an order as to the court's intent regarding the continuation of state court proceedings is considered a motion to alter or amend the judgment, under Rule 59(e)."). In an analogous context, the Fourth Circuit has explained that "in cases where a party [subsequently] submits a motion . . . which is unnamed and does not refer to a specific Federal Rule of Civil Procedure, the courts have considered that motion either a Rule 59(e) motion to alter or amend a judgment, or a Rule 60(b) motion for relief from a judgment or order." *CNF Constructors, Inc. v. Donohoe Constr. Co.*, 57 F.3d 395, 400 (4th Cir. 1995). In this case, Plaintiffs specifically refer to Rule 59(e) and have filed their Motion within ten days of judgment.[3] Therefore, to the extent Plaintiffs' Motion to Amend seeks clarification, it is properly filed under Rule 59(e).

ANALYSIS

Plaintiffs have requested an amendment and clarification of this Court's Order and Judgment and accompanying Memorandum Opinion. Specifically,

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[3] Rule 6(a)(2) of the Federal Rules of Civil Procedure provides that weekend days and legal holidays are excluded when computing a time period that is less than eleven days, and Rule 6(a)(1) provides that the date triggering the time period should also be excluded. Plaintiffs filed their Motion for Amendment on October 31, 2007, ten business days after October 18, 2007, the day after this Court rendered its Order and Judgment and accompanying Memorandum Opinion. Plaintiffs' motion was therefore timely under Rule 59(e).

Plaintiffs have requested that this Court clarify whether the Order and Judgment and accompanying Memorandum Opinion "extend[ed] to non-mortician entrepreneurs and companies the same general right to own corporate-licensed funeral homes that was previously available only to those lucky few able to acquire one of Maryland's 58 'grandfathered' corporate funeral homes" or only "enjoined Maryland from denying corporate ownership to Maryland-licensed morticians." (Pls.' Mot. 1.) The latter is the holding of the case.

This Court's analysis of section 7-310 in the Memorandum Opinion addressed only the *individual* licensing requirement, as opposed to the exempt corporate licenses that were subsequently addressed. This was done primarily because the parties continually referred to only section 7-310(b) of the Morticians Act, which, as Plaintiffs point out, literally requires that a *licensed individual* own or co-own a corporate funeral home. *See* Md. Code Ann., Health Occ. § 7-310(b)(2) ("An application for a funeral establishment license shall be signed by a *licensed individual who . . . is the owner or co-owner* of the establishment to be licensed." (emphasis added)).

In addressing whether the licensing scheme, as it relates only to licensed individuals, passed constitutional muster, this Court found that "the Maryland General Assembly could have rationally determined that the public's health, safety and welfare are furthered by requiring that a licensed mortician own the funeral home where mortuary

science is practiced." (Memo. Op. 17.) This Court then found that the surviving spouse and executor licenses – both of which are individual licenses – are insufficient to "strike down the regulatory scheme." (*Id.*) Moreover, this Court expressly held at the outset that the "licensing requirement may be imposed upon corporate and non-corporate *owners* of funeral homes in Maryland," indicating that the "licensing requirement" referred only to licensed individuals, regardless of whether that individual sought to own a corporate or non-corporate funeral home. (*Id.* at 3.)

This Court began its discussion of the corporate prohibition and the exempt corporate licenses by clearly stating that the individual licensing requirement could be applied to corporations under the Due Process and Equal Protection Clauses of the Fourteenth Amendment: "[t]he Maryland General Assembly certainly has a rational basis to require the presence of licensed individuals in the ownership structure of a corporation practicing mortuary science." (Mem. Op. 19.) Thus, a state *may* require that a licensed individual be part of the ownership structure of a corporation in certain highly skilled professions without violating the Fourteenth Amendment as long as the licensing requirement bears a rational relationship to a legitimate state interest. *See North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 166-67 (1973) (finding constitutional a state statute that required licensed pharmacists own the majority of shares in a corporation seeking to be licensed to practice pharmacy).

In response to Plaintiffs' Motion for Amendment of Judgment, Defendants have cited (for what appears to be the first time in this litigation) section 7-310(c) of the Morticians Act, which provides that "[t]he Board shall issue a funeral establishment license to a funeral establishment that . . . [w]ill be owned and operated in accordance with this title by at least one licensed mortician or one licensed funeral director, or a holder of a surviving spouse *or corporation license.*"[4] Md. Code Ann., Health Occ. § 7-310(c). Citing this provision and its statutory history, Defendants state in their response that they will *not* require that a licensed individual own or co-own a corporate funeral home, despite this Court's ruling that doing so was permissible under the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

In their Reply, however, Plaintiffs "worry that once the time for clarifying or appealing this Court's decision has passed, Defendants will interpret this Court's order as not *mandating* that the Board issue 'establishment licenses to new corporate licensees that are not owned by licensed funeral directors or

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[4] This provision appears to be facially inconsistent with the provision cited throughout this litigation, section 7-310(b), which requires that a licensed individual who owns or co-owns the funeral home sign the application, even if the funeral home is a corporation. Section 7-310(c), however, appears to permit a license to be issued to either a licensed individual *or* a corporation, without requiring that the licensed individual own the corporation.

morticians.'" (Pls.' Reply 2 (internal citation omitted.)). Plaintiffs therefore request that this Court declare that Defendants must allow an unlicensed individual to own a corporate funeral home.

Granting Plaintiffs' request would require that this Court amend its previous Judgment and Order, which it declines to do. Plaintiffs have not cited to an intervening change in controlling law, nor has any new evidence been presented. *See Pacific Ins. Co.*, 148 F.3d at 403. Plaintiffs have also failed to demonstrate that an amendment to this Court's prior Judgment and Order is necessary to "correct a clear error of law or prevent manifest injustice." *Id.*

In sum, this Court's prior ruling held that anyone capable of owning a funeral home in Maryland may do so in the corporate form under the dormant Commerce Clause. (*See* Mem. Op. 25-30.) However, Defendants *may,* but are not obligated to, require that a licensed individual own or co-own a funeral home. (*Id.* at 13-19.) If they choose to enforce the Morticians Act in this manner, they will not offend the Due Process and Equal Protection Clauses of the Fourteenth Amendment by enforcing it on corporate and non-corporate funeral homes alike.

Therefore, Plaintiffs' Motion to Amend is DENIED. This Memorandum Opinion serves only to clarify this Court's Order and Judgment (Paper No. 42) and accompanying Memorandum Opinion (Paper No. 41).

CONCLUSION

For the reasons stated above, Plaintiffs' Motion to Amend this Court's Order and Judgment (Paper No. 42) is DENIED. A separate Order follows.

/s/
Richard D. Bennett
United States District Judge

Dated: December 11, 2007

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CHARLES BROWN, *et al.*, Plaintiffs,	*	
v.	*	Civil Action No.: RDB-06-524
DAVID HOVATTER, *et al.*, Defendants.	*	

* *

ORDER

(Filed Dec. 11, 2007)

For the reasons stated in the foregoing Memorandum Opinion, IT IS HEREBY ORDERED this 11th day of December 2007 that:

1. Plaintiffs' Motion for Amendment of Judgment (Paper No. 43) is DENIED;

2. The Clerk of the Court transmit copies of this Order and accompanying Memorandum Opinion to counsel for the parties; and

3. The Clerk of the Court CLOSE this case.

/s/
Richard D. Bennett
United States District Judge

FILED: April 24, 2009

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08-1121 (L)
(1:06-cv-00524-RDB)

CHARLES BROWN; JOSEPH B. JENKINS, III; BRAIN CHISHOLM; GAIL MANUEL,

Plaintiffs-Appellants

v.

DAVID HOVATTER; FAYE PETERSON; MICHAEL RUCK, SR.; GLADYS SEWELL; DONALD V. BORGWARDT; MARSHALL JONES, JR.; MICHAEL KRUGER; BRIAN HAIGHT; ROBERT BRADSHAW; JEFFREY POPE; VERNON STRAYHORN, SR., in their official capacities as members of the Maryland State Board of Morticians,

Defendants-Appellees

ORDER

The petition for rehearing en banc was circulated to the full Court. No judge requested a poll under Fed. R. App. P. 35. The Court denies the petition for rehearing en banc.

For the Court

/s/ Patricia S. Connor, Clerk

U.S. CONST. ART. I, § 8, CL 3

Section 8. The Congress shall have power . . .

to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. . . .

* * *

MD. HEALTH OCCUPATIONS
CODE ANNOTATED (2009)

§ 7-101. Definitions

(a) In general. – In this title the following words have the meanings indicated.

(b) Apprentice. – "Apprentice" means an individual licensed by the Board who assists a licensed mortician or funeral director in the practice of mortuary science or funeral direction, under direct supervision of a licensed mortician or funeral director.

(c) Apprentice sponsor. – "Apprentice sponsor" means a person who:

(1) Is a licensed mortician or funeral director practicing mortuary science as a licensed mortician or funeral director in Maryland at least 1 year immediately prior to accepting the applicant as an apprentice; and

(2) Provides direct supervision to an apprentice.

(d) Board. – "Board" means the Maryland State Board of Morticians and Funeral Directors.

(e) Corporation. –

(1) "Corporation" means a mortuary science business whose articles of incorporation are in good standing with the Maryland State Department of Assessments and Taxation, or its successor, the initial business for which the license is issued must have

been incorporated on or before June 1, 1945 and have "Incorporated", "Inc.", or "Corporation" in its name.

(2) "Corporation" does not include, for purposes of issuing a corporation license, a "professional association" (P.A.) or a "professional corporation" (P.C.).

(f) Courtesy card. – "Courtesy card" means a license issued by the Board to licensed practitioners of mortuary science in other states, to make a removal of a dead human body in this State and to return the body to another state or country, to return dead bodies from another state or country to this State, to fill out the family history portion of the death certificate, and to sign the death certificate in the holder's capacity as a licensed practitioner of mortuary science.

(g) Funeral director. – "Funeral director" means an individual who is licensed by the Board to practice all aspects of mortuary science except for embalming.

(h) Funeral establishment. – "Funeral establishment" means any building, structure, or premises from which the business of practicing mortuary science is conducted.

(i) License. –

(1) "License" means, unless the context requires otherwise, a license issued by the Board.

(2) "License" includes, unless otherwise indicated:

(i) A mortician license;

(ii) An apprentice license;

(iii) A funeral director license;

(iv) A surviving spouse license;

(v) A corporation license;

(vi) A funeral establishment license; and

(vii) A courtesy card.

(j) Licensed apprentice. – "Licensed apprentice" means, unless the context requires otherwise, an apprentice who is licensed by the Board to assist a licensed mortician or funeral director in the practice of mortuary science or funeral direction.

(k) Licensed funeral director. – "Licensed funeral director" means, unless the context requires otherwise, a funeral director who is licensed by the Board to practice funeral direction.

(l) Licensed funeral establishment. – "Licensed funeral establishment" means, unless the context requires otherwise, a funeral establishment that is licensed by the Board.

(m) Licensed mortician. – "Licensed mortician" means, unless the context requires otherwise, a

mortician who is licensed by the Board under this title to practice mortuary science.

(n) Licensee. – "Licensee" means an individual or entity licensed by the Board to practice mortuary science to the extent determined by the Board.

(o) Mortician. – "Mortician" means an individual who practices mortuary science.

(p) Practice funeral direction. –

(1) "Practice funeral direction" means:

(i) To operate a funeral establishment;

(ii) For compensation, to prepare a dead human body for disposition; or

(iii) For compensation, to arrange for or make final disposition of a dead human body.

(2) "Practice funeral direction" does not include, for compensation, disinfecting or preserving a dead human body or any of its parts by arterial or cavity injection or any other type of preservation.

(q) Practice mortuary science. –

(1) "Practice mortuary science" means;

(i) To operate a funeral establishment;

(ii) For compensation, to prepare a dead human body for disposition; or

(iii) For compensation, to arrange for or make final disposition of a dead human body.

(2) "Practice mortuary science" includes:

(i) The practice of funeral direction; and

(ii) Disinfecting or preserving a dead human body or any of its parts by arterial or cavity injection.

(3) "Practice mortuary science" does not include the pickup, removal, or transportation of a dead human body, if the unlicensed individual is acting under the direction of a licensed mortician or funeral director.

(r) Pre-need contract. – "Pre-need contract" means an agreement between a consumer and a licensed funeral director, licensed mortician, or surviving spouse to provide any goods and services purchased prior to the time of death. Goods and services shall include:

(1) A service, including any form of preservation and disposition, that a mortician normally provides in the ordinary course of business; or

(2) Merchandise, including a casket, vault, or clothing, that a mortician normally provides in the ordinary course of business.

(s) Surviving spouse. – "Surviving spouse" means the legal widow or widower of a licensed funeral director or licensed mortician, whose license was in good standing at the time of death, and who at

the time of death, wholly or partly owned and operated a mortuary science business.

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§ 7-301. License required; exceptions

(a) In general. – Except as provided in subsection (b) of this section, an individual shall be licensed by the Board before the individual may practice mortuary science in this State.

(b) Exceptions. – This section does not:

(1) Limit the right of a school of medicine or dentistry to use and dispose of a dead human body or its parts;

(2) Limit the right of any person who is authorized by law to handle or dispose of a dead human body or its parts, if the person acts within the scope of that authorization;

(3) Affect the right of an authorized officer or employee of the United States or the District of Columbia to practice mortuary science in the course of that individual's duties;

(4) Apply to an individual who makes funeral arrangements in the course of the duties of that individual as an attorney; or

(5)(i) Limit the right of the Board to issue temporary permits to out-of-state licensed morticians or funeral directors for teaching purposes involving

an approved continuing education program or disaster situations as deemed necessary by the Board.

(ii) A mortician or funeral director who is issued a temporary permit shall be subject to any conditions and limitations that the Board may specify in the permit and the provisions of this title.

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§ 7-303. Qualifications of applicants for mortician or funeral director license

(a) Determination of qualifications by Board. –

(1) The Board shall determine the qualifications necessary for an individual to lawfully engage in the practice of mortuary science or funeral direction and to operate a funeral establishment within this State.

(2) Except as otherwise provided in this subtitle, to qualify for a mortician or funeral director license, an applicant shall be an individual who meets the requirements of this section.

(b) Examinations; issuance of license. – The Board shall examine all applications for licensure for the practice of mortuary science or funeral direction and shall issue the mortician or funeral director license to an individual who:

(1) Is judged to be of good moral character;

(2) Has completed not less than 1 year and not more than 2 years of licensed apprenticeship,

unless the Board allowed extensions for additional 1-year terms;

(3) Except as otherwise provided in this section, has graduated with an associate of arts degree in mortuary science or its equivalent from a school accredited by the American Board of Funeral Service Education or approved by the Board, or has acquired at least an associate of arts degree and completed a course in mortuary science that is accredited by the American Board of Funeral Service Education or approved by the Board;

(4) Has passed the national board examination administered by the Conference of Funeral Service Examining Boards of the United States;

(5) Except as provided in subsection (c) of this section, has passed a written examination on Maryland law and regulations governing the practice of mortuary science and a practical examination demonstrating competency in the preparation of dead human bodies for final disposition and sanitary science; and

(6) Has submitted an application to the Board on the required form and has paid a fee set by the Board.

(c) License to practice funeral direction. – For an individual applying for a license to practice funeral direction, the practical examination qualification

under subsection (b)(5) of this section may not include demonstrating competency in embalming.

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§ 7-305. Waiver of requirements

(a) Authorized. – Subject to the provisions of this subsection, the Board may waive the examination and apprenticeship requirements of § 7-303 of this subtitle and issue a mortician or funeral director license to an applicant who is licensed to practice mortuary science or funeral direction in any other state.

(b) Conditions. – The Board may grant a waiver under this subsection only if the applicant:

(1) Pays the license fee required by the Board under § 7-303 of this subtitle;

(2) Was a licensed mortician or funeral director in good standing in the other state;

(3) Serves an apprenticeship consisting of 1,000 hours; and

(4) Passes the Maryland State written examination administered by the Board.

(c) Reciprocity. – The Board may grant a waiver only if the state in which the applicant is licensed:

(1) Grants a similar waiver to licensees of this State; and

(2) Has standards for a mortician or funeral director license that are not lower than those of this State.

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§ 7-308. Surviving spouse license

(a) Issuance. – Subject to the provisions of this section, the Board shall issue a surviving spouse license to an applicant if the applicant:

(1) Is the surviving spouse of a licensed mortician or licensed funeral director whose license was in good standing at the time of death and who at the time of death was operating and wholly or partly owned a mortuary science business;

(2) Is not a licensed mortician or licensed funeral director;

(3) Submits to the Board, within 30 days of the death of the licensed mortician or funeral director, written verification of the death of the licensee and the application required by the Board; and

(4) Pays a fee set by the Board.

(b) Examination. –

(1) Within 6 months of the issuance of the surviving spouse license, the applicant must take the written Maryland State law examination administered by the Board under § 7-304(b), (c), (d)(1), (e), and (f) of this subtitle,

(2) The license becomes null and void if the surviving spouse fails the Maryland State law examination twice.

(3) An applicant may retake the law examination as often as necessary to fulfill the requirement of this subsection.

(c) Sale of business. – Nothing in this section shall prevent a surviving spouse from selling the mortuary science business that was operated and wholly or partly owned by the licensed funeral director or licensed mortician.

(d) Scope. – Except as provided in subsection (c) of this section, while a surviving spouse license is effective, it authorizes the licensee to:

(1) Continue the operation of the mortuary science business that had been operated and wholly or partly owned by the spouse of the licensee; and

(2) Assist with the planning and conducting of funeral services for that mortuary science business.

(e) Conditions. – The Board may issue a license under this section only if:

(1) The business is operated under the direct supervision of a licensed mortician or funeral director; and

(2) The embalming is done by a licensed mortician.

§ 7-308.1. Executor license

(a) In general. – A personal representative of a deceased mortician's or funeral director's estate shall be licensed by the Board before continuing operation of the mortuary science business.

(b) Requirements. – The Board shall issue an executor license to an applicant if the applicant:

(1) Is the appointed personal representative of a deceased mortician's or funeral director's estate in accordance with the requirements established in Title 5 of the Estates and Trusts Article;

(2) Submits to the Board, within 30 days of the death of the licensed mortician or funeral director, written verification of the death of the licensee, written verification of appointment as a personal representative, and the application required by the Board; and

(3) Pays a fee set by the Board.

(c) Sale of business permitted. – Nothing in this section shall prevent a personal representative from selling the mortuary science business that was operated and wholly or partly owned by the licensed funeral director or licensed mortician.

(d) Authorized activities. – Except as provided in subsection (c) of this section, while an executor license is effective, it authorizes the licensee to:

(1) Continue operation of the mortuary science business that had been operated and wholly

or partly owned by the deceased mortician or funeral director; and

(2) Assist with the planning and conducting of funeral services for that mortuary science business.

(e) Licensed mortician required. – The Board may issue a license under this section only if:

(1) The business is operated under the direct supervision of a licensed mortician or funeral director; and

(2) The embalming services are provided by a licensed mortician.

(f) Expiration. – Notwithstanding the provisions of § 7-314 of this subtitle, an executor license is valid for six months from the date of issuance and may not be renewed or reinstated after expiration.

(g) Continuation after expiration. – A personal representative who wishes to continue operation of a mortuary science business upon expiration of the executor license must qualify and be licensed as a mortician or a funeral director, or be the holder of a surviving spouse or corporation license.

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§ 7-309. Corporation license

(a) In general. – Except as otherwise provided by law, a corporation may not operate a mortuary science business and the Board may not issue a

license to or list any corporation as licensed to operate a mortuary science business.

(b) Exception. – The Board may renew only the license of a corporation that:

(1) On June 1, 1945, held a license issued by this State;

(2) Has been renewed continuously since that date;

(3) Submits an application on a form required by the Board; and

(4) Pays a fee set by the Board.

(c) Contents of application. – Each application for renewal made by a corporation shall state the name and address of each officer and director of the corporation.

(d) Scope of license. – While a corporation license is effective, it authorizes a corporation to operate a mortuary science business only if any practice of mortuary science that is conducted for the corporation is practiced by a licensed individual.

(e) Branch establishments. – A corporation may not operate a branch funeral establishment unless the branch funeral establishment was in operation on or before October 1, 1964.

(f) Sale, bankruptcy, or cessation of operations. – If a corporation is sold, declares bankruptcy, or

ceases to operate, written notice must be submitted to:

(1) The Board, within 2 weeks of the occurrence, detailing the changes and the arrangements for carrying out the pre-need contracts and disbursement of the money held in escrow; and

(2) The holders of pre-need contracts advising them of their options under Maryland law.

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§ 7-310. Funeral establishment license

(a) License required; restrictions. –

(1) A funeral establishment shall be licensed by the Board before the establishment may be used for the preparation of the remains, viewing, and conducting of services.

(2) The licensee may be restricted to operations as determined by the Board.

(b) Application. –

(1) To apply for a funeral establishment license, an applicant shall:

(i) Submit an application to the Board on the form that the Board requires; and

(ii) Pay to the Board:

1. An application fee set by the Board; and

2. The fee established under § 7-4A-05(a) of this title.

(2) An application for a funeral establishment license shall be signed by a licensed individual who is not an apprentice but is the owner or co-owner of the establishment to be licensed.

(c) Issuance. – The Board shall issue a funeral establishment license to a funeral establishment that:

(1) Has complied with all applicable State and local laws;

(2) Will be owned and operated in accordance with this title by at least one licensed mortician or one licensed funeral director, or a holder of a surviving spouse or corporation license; and

(3) Will be held responsible for any and all activities performed on the premises.

(d) Name on license to appear on signs and advertisements. – Signs and advertisements of a funeral establishment shall display the name that appears on the establishment license.